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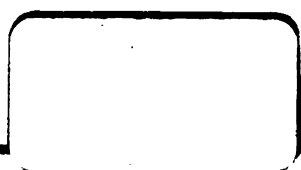
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ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

TRINITY TERM,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

ERRATUM.

In page 585, line 10 from the bottom, for "*41 Geo. 3, cap. cxxxv,*"
read "*47 Geo. 3, cap. ,*"

On certain real estates at Chorley, in the county of Lancas-
ter, by his will, properly executed and attested, devised
the same to certain trustees and their heirs, to the use of
Thomas Hawarden (his eldest nephew) for life, remainder
to trustees to preserve contingent remainders; remainder
to the use of the first and other sons of *T. H.* in tail male,
with divers remainders over. The will contained a clause
directing *T. H.* and the other persons, who might come
into possession of the hereditaments devised, to assume
the surname and arms of *Gillibrand* only.

thereby creates a power of incumbering. *Z.* afterwards devises other lands to *E.*, the
second son of *C.* in tail, with a limitation over, in case the land devised by *A.* in tail
male shall descend to or devolve upon *E.* *D.* the eldest son of *C.* dying in his life-time,
E. upon the death of *C.* takes, subject to an incumbrance created under the power, the
land devised by *A.*:—Held, by *Denman, C. J., J. Parke, J. and Patteson, J., dissentiente*
Tauntton, J., that *E.* is not incapacitated from holding both estates.

and other sons
of *B.* in tail
male. After
the death of
A. and *B.*, *C.*
the first son
of *B.* enters,
suffers a reco-
very and re-
settles the pro-
perty by a
deed, to which
Z. is an exe-
cuting party,
as trustee of a
term, and



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Fazakerley
v.
Ford.

tlement, as the estate tail created by the will of *W. Gillibrand* was destroyed.

A clause which divests an estate is to be construed most strictly. A person who makes a will containing a divesting clause of this description, must be taken to contemplate the descent of the *whole* of the estate upon the devolution of which the preceding vested estate is to go over. It would be unsafe to speculate as to the intentions of the testator as to how much or how little ought to devolve before the preceding estate goes over to another person. The estate of *W. Gillibrand* can no longer come in its original form to any of the persons who were the objects of Mr. *Fazakerley's* bounty. The estate had not only undergone a change in its title, but had also suffered a diminution in value. It is subject now to a jointure of 500*l.* a year, and is charged with 10,000*l.* for younger children's portions. The power of sale and exchange contained in the will of *W. Gillibrand* was exercised in a variety of instances, previously to the death of Col. *Fazakerley*, to such an extent that there is now a large sum of money, the produce of the sale of the estate, lent upon mortgage, and property of the value of 5000*l.* was exchanged. The Court has no right to presume that Col. *Fazakerley* intended that this estate, so altered in title and diminished in value from what it was when the will of *W. Gillibrand* was made, should not unite with the *Fazakerley* estate.

A case like this, which is admitted to be destitute of all direct authorities, and where the Court is called upon, for the first time, to lay down a general rule, is one of all others in which there is good reason for stepping out of the mere technical rules of decided cases, and referring to general principles. One of the first general principles which ought to regulate a question of this nature is, that such a rule should be laid down as will be certain in its application, will tend to render titles secure, and will not leave them to fluctuate according to the various opinions, views, sentiments and feelings of judges. One great object of civil society

is the preservation and distribution of property. It has been said by some philosophers that the law of property and the law of marriage are the foundations of civil society; but those who refer to first principles say, and say justly, that the law of marriage itself is but a branch of the law of property. That the necessity of ascertaining what parents ought to have the obligation of maintaining their children, is but the result of that distribution and arrangement of property which is the real object of all civilized society. It follows from this that it is of the utmost importance that those rules of distribution should be as certain as possible. Every deviation from certainty is an injury; every approximation to it is an advantage. It can be of no importance to a state whether *John* or *Thomas* shall have this property, but it is of very great importance that it should not be uncertain which shall have it. Before the statute allowing estates to pass by devise, the rules for the descent and the distribution of real estate approximated to great certainty. Since the statute of wills, the natural disposition of judges to give effect to the intentions of testators, has created a multiplicity of rules and a variety of decisions, which present any thing but certainty. This is the origin of executory devises, contingent remainders, shifting uses, conditional limitations, and many other heads of the law (*a*). These are supposed by some to render the law obscure; but all admit that they render the devolution of an estate under a will doubtful and uncertain. If the same rigorous rules had been adopted for the interpretation of wills as are applied for the construction of deeds, all this confusion would have been avoided (*b*). Nothing can be more inconvenient than the

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(*a*) It may be doubted whether it would have been possible to give that disposing power over property which is now enjoyed, without the introduction of these or of similar heads.

(*b*) The only real difference of construction seems to be, that by a deed, except where it operates under the statute of uses, an estate of inheritance cannot pass without the word "heirs."

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 FORD.

divesting a vested estate. Every man who holds an estate under a will containing a clause of this description, holds it at the constant peril that himself and his family may be ruined. It must be admitted that the vesting and divesting an estate may be effected to gratify the wish of a testator. The Courts have come to this determination with difficulty, and have been very unwilling to divest an estate even upon the clearest evidence of the testator's intention, where express words are wanting. *Driver v. Frank* (a) illustrates the proposition that the intention of a testator is very often differently collected by different minds, and that the moment you make that the only rule for your decision, you set titles afloat and render the law of property uncertain. That case was argued twice in this Court and twice in the Exchequer Chamber (b). There a lady devised an estate to *Bacon Frank* for life; remainder to the second, third, fourth, and all and every other the sons of *Bacon Frank* (except the first or eldest son), successively in tail male, with remainders over. The majority of the judges held, that the remainder to the second and other sons of *Bacon Frank* (who had no issue at the time of the death of the testatrix) was contingent till *Bacon Frank* had two sons living, and not until his death, and that as soon as he had two sons alive, it became vested, and not liable to be divested by any subsequent changes in the family of *Bacon Frank*. The argument of the majority of the judges in that case was, that although the law did permit these shifting estates, yet that in general the inconvenience attendant upon them was so great, that to give effect to these clauses, the intention of the testator ought to be expressed in the strongest and clearest manner, by words in the will. The principle to be extracted from that case is this, that the safest rule to be laid down in doubtful cases is that which will be attended with certainty. So here, the best course is to lay down a rule which will be certain in its application. If the Court

(a) 3 M. & S. 25.

(b) 6 Price, 41; 2 B. Moore, 519.

determines that in a case like this the vested estate shall be forfeited, although the estate, upon the devolution of which the vested estate is to go over, has not descended in the order of descent marked out by the will devising the estate, great inconvenience will follow. Suppose the tenant in tail who suffered the recovery of the *Gillibrand* estate had mortgaged it for the full value except 500*l.*, would the Court say that because a fragment of the estate had devolved upon the person in possession of the *Fazakerley* estate that the latter estate should go over? It will be said on the other side, suppose the *Gillibrand* estate had descended despoiled of one acre only, would not the *Fazakerley* estate have gone over in that case? It is submitted that it would not. It is better to adopt this rule, that if the estate do not descend in statu quo to the devisee, the vested estate shall not go over. The safest course is to adopt the letter of the will, and to say that the testator, Col. *Fazakerley*, intended that whenever the *Gillibrand* estates should descend upon the same person who was in possession of the *Fazakerley* estates, they should be dis-united, but that the testator meant a descent under the will of *W. Gillibrand*. There is another reason why the divesting clause does not apply to the plaintiff. The *Fazakerley* estate is to pass over upon its coming to a person who was at that time entitled to the rents and profits of the *Gillibrand* estate. It appears by the case that the plaintiff was not of age when his father died. At that time therefore he was not entitled to the rents and profits, because they were to be paid into the hands of the trustees, who were to allow him a maintenance. The rents and profits were to be laid out in the purchase of other estates, from which he would derive no benefit if he died under age. In this way the plaintiff was clearly not entitled to the rents and profits of the *Gillibrand* estate. It will be said that the testator used these words to denote the person who, according to the general provisions of the will, would be entitled, were it not for the particular clause alluded to.

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That is a matter of uncertainty. This clause is to be construed most strictly. By the provisions of the will, the plaintiff would not be entitled, during his minority, to the rents and profits, but only to a maintenance. The condition does not apply to him, because the condition only refers to the event of his being in possession of the rents and profits of the *Fazakerley* estate, when the other estate devolved upon him. Suppose that *T. H. Gillibrand* (the son) had died before *Col. Fazakerley*, leaving his eldest son living, the eldest son would then become entitled to the rents and profits of the *Gillibrand* estate. Suppose that the eldest son had then died, the second son would then take the *Gillibrand* estate. The testator, *Col. Fazakerley*, dies a day after this. The second son in this case would have retained both the estates. This shews that the condition is to be strictly construed; that the party must be in possession of the rents and profits of the *Fazakerley* estate at the time when the *Gillibrand* estate descends upon him. It will be said on the other side that the words, the manor, &c. devised by the will of *William Gillibrand*, deceased, to *Thomas Gillibrand*, for an estate in tail male, are only a description of the estate intended to be devised, and that the testator refers to the settlement, but not to the will of *Gillibrand*. It is admitted that if *Col. Fazakerley* had the settlement in his mind, with the powers of sale and exchange and the various provisions contained in it, that he must have intended the *Fazakerley* estate to go over, although a portion of the *Gillibrand* estate only descended. The argument on the other side is founded only on conjecture. It is not likely that because a man had signed a marriage settlement, he should keep it in his mind. Suppose that under the settlement the whole of the *Gillibrand* estate had been sold, and the person in possession of the *Fazakerley* estate had purchased it, would the latter estate in that case go over? Shall it be said that if by any accident, in whatever form or way, whether by purchase, by limitation, by devise, or by gift, the *Gillibrand* estate, or any part of it, should come

to the person in possession of the *Fazakerley* estate, that then the *Fazakerley* estate is to go over? It will be said that Col. *Fazakerley*, when he made his will, had the settlement in 1801 in his contemplation, because he was a party to it. Is it to be taken as a positive rule of law that the trustee of a marriage settlement must know all the details of it, and that when he makes his will, it must be supposed that he has all the particulars in his mind? If this is to be presumed, it will be inferred from matter dehors the will, and evidence unconnected with the will must be received. Is the construction of the will to vary according to the circumstance whether or not Col. *Fazakerley* knew of the marriage settlement? If there had been any ambiguous clauses in the will—if there had been such a general reference in the will as to make it uncertain to what the will related; then an inquiry as to extrinsic circumstances might have been made. Col. *Fazakerley* has referred to nothing but *W. Gillibrand's* will. Is it allowable for the Court to travel out of the will, and to hear parol evidence in order to explain the meaning of the clause in question? Col. *Fazakerley* clearly meant that his estate should go over when the possessor had got a fair equivalent. Surely an estate incumbered with a jointure of 500*l.* a year, and burthened with the sum of 10,000*l.*, is not the same as an estate without those incumbrances.

The will of Col. *Fazakerley* was republished with various codicils, the last of which was in 1813, when he died, and the various sales were made in 1805, 1806, 1807, 1811, and 1812, and again in 1815, 1816, and 1828; and it is attempted to be inferred, that because Col. *Fazakerley* published his will afterwards, he knew of those sales. No jury would draw such a conclusion.

The summary of the arguments for the plaintiff is, that this is a clause that ought to be construed strictly, inasmuch as by the general rules of law shifting clauses are to be construed strictly—that if the Court should be of opinion, on looking at this will, that the estate in question was the

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Gillibrand estate, devolving under *Wm. Gillibrand's* will, yet that the estate being altered by the settlement, and being impaired in value, cannot now devolve as the testator contemplated; and that not being so, this clause cannot apply—that the rents and profits of the *Fazakerley* estate were not in the possession of the plaintiff at the time the *Gillibrand* estate devolved upon him—that if it is supposed that the settlement is referred to at all, still it is open to the Court to say that the testator, Col. *Fazakerley*, must have supposed that the settlement would not have made that alteration in the estate which it has subsequently made; and that the safest rule is to construe this clause strictly.

Follett, for the defendants. It is admitted that there is no authority precisely similar to this case, but it is denied that this is a case of the first impression as regards the principle to be applied to the construction of this will. The Court is not called upon to lay down any rule about the construction of wills. If the Court were called upon for the first time to lay down such a rule, it might be well to lay down the principle contended for, and to have certainty rather than to have to seek for the intention of the testator. It might have been better if the Courts never had allowed shifting clauses to take effect, but they have done so because it was the object of the Courts to carry into effect the intentions of the testator, if they were not contrary to any known principles of law. If the Court decide in favour of the plaintiff, it is clear that it will decide against the intention of the testator. It is said that the will has been drawn with the utmost care; that the first persons in the profession were employed in preparing it, and that every information was, or should have been, before the party who drew it. The Court cannot decide in favour of the plaintiff without saying that all the care and learning bestowed upon this will has been thrown away, and that this will does not carry into effect the intentions which the persons who penned it intended that it should carry into effect. It is

conceded that in construing this will, the Court will look at the state of the property and of the family, and at the situation of the testator at the time he made his will, and that the construction must be made with reference to the state of facts at that time. But it is said that the Court cannot refer to the settlement without going out of the will. The Court cannot construe the will of Col. *Fazakerley* without referring to the will of *Wm. Gillibrand*, because none of the provisions of the latter will are stated in the former. If the Court look at the situation of the property and of the testator at the time the will of Col. *Fazakerley* was made, and apply the same rules in construing this will as they have done to others, there can be no doubt that the divesting clause took effect. The will of Col. *Fazakerley* is made in 1804; the codicils at different periods, the last of them in 1813. The persons who are the objects of the bounty of Col. *Fazakerley* are his nearest relatives. They do not belong to the family either of *Gillibrand* or *Fazakerley*, but to a family of the name of *Hawarden*. Under the settlements of the *Gillibrand* or *Fazakerley* family, the *Hawardens* would not derive any property. By the will of 1804, Col. *Fazakerley* leaves to the second son of *Thomas Hawarden* the *Fazakerley* estates. The object of Col. *Fazakerley* is, that the second son of the *Hawarden* family should receive the *Fazakerley* estates. At the time of that devise the plaintiff was the second son of *T. H. Gillibrand* (the son). Col. *Fazakerley* died in 1813; and therefore at that time the plaintiff took a vested interest under the will of Col. *Fazakerley* in this estate, and within a year after the death of Col. *Fazakerley*, in pursuance of the proviso in the will, he assumed the name of *Fazakerley*. In 1816 his eldest brother died. In 1828 his father, *T. H. Gillibrand*, (the son,) died, upon whose death the *Gillibrand* estate devolved upon him. The question therefore is, whether the plaintiff, according to the intentions of Col. *Fazakerley*, can hold both the *Gillibrand* and *Fazakerley* estates. In 1787 the father of the plaintiff became tenant in tail, and upon

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the father's marriage, in 1801, a settlement was made. To that settlement Col. *Fazakerley*, the nearest relation of the family, is one of the executing parties. By that settlement it is recited, that it had been agreed that the estate should be settled in a certain way, and that for that purpose a recovery should be suffered of the *Gillibrand* property, and an estate for life, in lieu of his previous estate tail, was given to *T. H. Gillibrand* (the son); a remainder in tail male was limited to his eldest son, with remainder over. By the settlement also a term of 500 years was created, and vested in Col. *Fazakerley*, the trusts of which were to raise a jointure for the wife of *T. H. Gillibrand*, (the son,) and to furnish portions for younger children. The settlement also contained a power of sale and exchange over the lands which came from *William Gillibrand*. This being the situation of the family, it is said that Col. *Fazakerley* did not know it. The divesting clause in the will shews that Col. *Fazakerley* did know it, as Col. *Fazakerley* was an executing party to the deed, and as the family were his relatives, and the objects of his bounty. The fair and proper inference is, that he did know it. In 1804 Col. *Fazakerley* makes his will. Three years afterwards some of the children are born. In the meantime, between 1804 and 1813, the greater part of the lands of the *Gillibrand* property have been sold or exchanged by the trustees; and in 1813, after those sales and exchanges have taken place, Col. *Fazakerley* makes his last codicil. By the proviso it is submitted that Col. *Fazakerley* intended that this estate should go over to the second son. That intention must take effect, unless it is controverted by some positive rule of law. It is admitted that in order to give effect to the divesting clause, the devolution must be a devolution under the will of *William Gillibrand*. Col. *Fazakerley*, when he speaks of the estate under the will of *William Gillibrand*, means to describe the property. There was no other way by which he could describe the property that had come into the family of *Hawarden*

under the will of *William Gillibrand*. Suppose he had used the words "the *Gillibrand* estate," it would have meant the same thing.

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A great deal has been said here, and was said in the Vice Chancellor's Court, on the meaning of the word "devolve." The Vice Chancellor, who repudiated the other arguments used to-day, decided this case on the meaning of that word. His Honour said, however, that it was not a very agreeable thing to decide with respect to property of such an amount as this, and apparently against the intention of the testator, upon the grammatical meaning of a word. It is contended that the meaning of the word "devolve" is to come from one person to another. Here the testator has used two words, "shall descend or devolve." The reason of using these two words is obvious. If *T. H. Gillibrand* (the son), who was tenant in tail under the will of *William Gillibrand*, had remained tenant in tail, that estate tail would have *descended*. If that estate tail was destroyed, and another estate substituted, the latter estate would *devolve* under the will of *William Gillibrand*. By the settlement the succession under *William Gillibrand's* will is destroyed, and the estates under the limitations of that settlement *devolve* upon the second son. It is therefore probable, that the word "devolve," which the Vice Chancellor turned against the defendant, was used because the person who drew this will had the settlement before him, which altered the succession under the will of *William Gillibrand*. The introduction of the word "devolve," so far from furnishing an argument against the defendant, shews that the allusion made to the will of *William Gillibrand* is only a designation of the property.

The terms of the proviso have been strictly complied with. The Courts have undoubtedly said, that where there is a shifting clause, in case the party do not assume a certain name, such a condition is to be construed strictly. But it has not been held, that a clause that two estates shall not unite in one person shall be construed

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strictly. The plaintiff is tenant in tail in possession of the *Fazakerley* estates. The *Gillibrand* estate has devolved upon him, and the present defendant is the third brother, and therefore these estates passed to him. [*Denman*, C. J. Supposing the party had sold the estates, and somebody representing him had bought them again, I presume you would say that that is not a devolution, because he would be a purchaser under his own act.] That would not be a devolution. There may be a great many cases to which the shifting clause will not apply; but at the present moment the estate is precisely in the same situation as that in which it existed at the time the will was made. There exist the same incumbrances and the same right to incumber. It is precisely in the same shape and the same form. There can be no dispute as to the meaning of the word "devolve." It means the changing from one person to another. That is the definition found in the Dictionaries. [*Parke*, J. You would perhaps confine the meaning of the word "devolve" to coming in a course of limitation.] That is the meaning contended for. [*Denman*, C. J. You do not contend for the general proposition, that in any possible way by which the estate might have come to the plaintiff, this clause would take effect.] No, it is not necessary to contend for that. That part of the shifting clause which says that a person who is obliged to assume another name, under pain of forfeiture of estate, need not take the name of *Fazakerley*, was referred to by the other side, to shew that the person who drew the will of Col. *E. Fazakerley* had before him only the will of *Wm. Gillibrand*, and not the settlement of 1801. In the will of *William Gillibrand* there is no forfeiture or shifting clause of any kind if the devisee do not take the name of *Gillibrand*; there is a mere direction to the parties to do it. It is asked, in order to carry into effect the intentions of the testator, would you make the object of his bounty a beggar? It will be for the Court to deal with a case of that sort when it comes before it. In this case the estate

devolved upon the second son of precisely the same value, and precisely under the same circumstances as when Col. *Fazakerley* made his will. Col. *Fazakerley* knew, he must have known, that there was power to charge these estates to the extent of 500*l.* a-year for the wife, and 10,000*l.* for the younger children; and, knowing this, he says, if this estate devolves upon the party, then my estate shall go over. If the mere power to charge, or the actually incumbering the descending estate, is sufficient to render these shifting clauses inoperative, the result will be that they never can be applied. It is conceded, however, that if by the will of *Wm. Gillibrand* there was a power to incumber, then that the incumbrance of the descending estate would not prevent the operation of the shifting clause. The case then comes to this issue, and the Court must be satisfied by the plaintiff that Colonel *Fazakerley* did not know of the settlement of 1801. Col. *Fazakerley* was a trustee of the term created for the purpose of securing the jointure and the younger children's portions. Is it to be assumed that Col. *Fazakerley* was ignorant of the state of the property? From the care with which the will of Col. *Fazakerley* was drawn, from the evident object of the testator, and his connection with this family, it is fair to presume that he knew every thing relating to these estates. It is not contended, that if some incumbrance had been put on this estate which was not in the contemplation of the testator, or if the estates had been sold and purchased back again, that the shifting clause would operate. The case, therefore, comes to this,—will the Court presume that Col. *Fazakerley* was utterly ignorant of the settlement? Supposing Col. *Fazakerley* had not signed the settlement, he must be presumed to have known it, for he must be presumed to have made his will with reference to the existing state of facts. Supposing the reference to the will of *Wm. Gillibrand* had been left out altogether, and the testator had said that the *Fazakerley* estate should shift if the other estate descended or devolved, the Court, to construe the will,

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would have looked at the estate at the time the will was made. These shifting clauses are often inserted in wills, without reference to the mode in which the estates are to descend. [*Denman*, C.J. The argument on the other side is, not that you must *presume* ignorance of the settlement, but they undertake to *prove* ignorance of the settlement from the nature of the will; and my brother *Taunton* observes, that it is very extraordinary that if this settlement was in the contemplation of the testator he did not advert to it, and that he was content with describing the estate as being devised by the will.] Suppose that there had been no allusion to any settlement or will at all, and the testator had designated the property in some other way,—if, for example, he had said the property which was formerly the estate of *W. Gillibrand*,—it is submitted that the Court would then have construed the will with reference to the limitations in the settlement. It is said that the case is different, because the will of Col. *Fazakerley* alludes to the will of *W. Gillibrand*. It is not different, because the allusion is only made to describe the property. To suppose that the testator intended that the *Gillibrand* estate was to descend or devolve under the terms of the will of *W. Gillibrand*, not only must it be presumed that Col. *Fazakerley* was ignorant of the contents of a deed to which he was a party, and of the state of the family that he was making the object of his bounty, but the shifting clause must be made inoperative from the very moment it was put into the will. That clause never could have operation, if it alluded to the will of *W. Gillibrand* in the way contended for. To suppose it does so allude, is to repudiate and destroy a considerable portion of the will from its very commencement; for the estate tail created by the will of *W. Gillibrand* was destroyed. [*Patteson*, J. I understood that to be the argument on the other side, that it never could take effect at all.] That was not stated openly, but it is the effect of the argument. One of the rules laid down for the construction of wills is, that you shall not

repudiate a great part of it; but it is contended that here there is a great part of the will which was written without any object. [*Patteson, J.* That was under a mistake.] Considering the care with which this will is drawn, the Court cannot presume that the testator has introduced a great portion of it which was to become inoperative. If the will of Col. *Fazakerley* does not refer to the limitations in the will of *W. Gillibrand*, the whole argument on the other side falls to the ground. It is asked, suppose by means of the powers of sale and exchange the whole of the *Gillibrand* estate had gone except one acre, would the shifting clause operate then? The same answer may be given to that question as was given by the Vice-Chancellor; he says, that argument does not apply here, because under the settlement the lands procured by the money arising from the sale, and by the exchanges, were subject to the same uses and became part of the *Gillibrand* estate. [*Parke, J.* You assume that Col. *Fazakerley* knew of the settlement.] That is the basis of the argument. Is it to be assumed that he was not cognizant of the affairs of his own family? The greater part of the sales took place in 1819.

There is another objection which has been stated to the operation of the shifting clause. That the plaintiff was not intitled to the rents and profits of the *Fazakerley* property at the time the *Gillibrand* estate devolved upon him. It is quite clear that what Col. *Fazakerley* meant was, that if any person, in the shape of a second son, being in possession of the *Fazakerley* property, became afterwards, by the death of the eldest son, entitled to the *Gillibrand* estate, that the *Fazakerley* estate should go over to the third son. As to the intention of Col. *Fazakerley* there can be no doubt. It clearly was this, that the *Gillibrand* property and the *Fazakerley* property should not unite in one person. In *Doe dem. Long v. Laming (a)*, Mr. Justice *Wilmot*, who delivered the judgment of the Court, after premising that

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(a) 2 Burr. 1112.

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the Court were obliged to the gentlemen who had argued the case at the bar for declining to go into that long string of cases usually cited upon this subject, said, "For the principle that must govern all cases of this kind is the intention of the testator, provided it be not inconsistent with the rules of law; and all cases which depend upon the intention of the testator, which is the pole star for the direction of devises, are best determined upon comparing all the parts of the devise itself, without looking into a multitude of other cases; for each stands pretty much upon its own circumstances, and one is no rule for another, or very seldom, at least." This being the principle laid down, it is somewhat too late to contend that the security of property would have been better obtained by construing wills precisely with the same strictness as deeds are construed. It is not necessary to enter into that argument. It might be urged that it is extremely hard that a party who has wished that his estate should go in a particular way, should, by some unfortunate mode of expressing himself, have his intentions utterly defeated. But without entering into that question, the Court will carry the intention of Col. *Fazakerley* into effect, unless prevented by some unbending rule of law. The intention, it is submitted, is clear that the estates shall not vest in the same person; and the way to construe the will is to look at the existing state of facts at the time the will was made. The *Gillibrand* property has devolved upon the second son precisely in the way contemplated by Col. *Fazakerley*, precisely as it stood at the time his will was made. The Court is not bound to presume that Col. *Fazakerley* was ignorant of what every body else must suppose he knew.

Sir *James Scarlett* in reply. If the propositions stated on behalf of the defendant were correct, the conclusion would be inevitable. If the construction contended for on the other side would violate no rule of law, and if Colonel

Fazakerley's intention was clearly that which the defendant considers it, the plaintiff can have no case. But the argument involves a *petitio principii*. The defendant should have endeavoured to convince the Court that every gentleman must know all the contents of a marriage settlement, of which he happens to be a termor for the benefit of some relation, and that a gentleman who resides at Bristol must know how an estate in the hands of a distant relation is dealt with at Chorley.

It is said that you cannot decide in favour of the plaintiff unless it is presumed that Colonel *Fazakerley* was totally ignorant of all the circumstances that followed his will. No such violent presumption is demanded. It is sufficient if the Court are not certain about it. The Court will not indulge conjecture, and will not presume that Colonel *Fazakerley* knew all those circumstances, unless something in the will itself affords evidence of that. Then the same answer may be given to the argument on the other side, as in *Driver v. Frank*. The intention is highly probable; but the testator has not expressed it. If Colonel *Fazakerley* intended to refer to the settlement, he has not referred to it in such terms and in such a manner as to leave no doubt upon the subject.

It is said that the clause in Col. *Fazakerley's* will, which speaks of the descent or devolution of the property of *Gillibrand*, can have no reference to the will of *Gillibrand*. This is a singular perversion of the facts of the case. If the word "devolution" did not apply to the will, it would be equally inapplicable to the settlement. The will devises the estate as an estate in tail male in succession, and the settlement conveys it in the same form. An estate is said to descend when it goes to the heir, whether it be an estate in fee or an estate in tail. If the *Gillibrand* estate had been vested in any other son or any other tenant in tail, and he had died leaving an heir male, the estate would very properly have been said to descend to that heir male; but supposing the son to have died without heir male, leaving a daughter,

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and the estate had gone over to the brother in remainder, the estate could not be said to "descend" to the brother, because he was not the heir of the former possessor, it would "devolve" to the brother^(a). The gentleman who drew the will has taken the two words "descend and devolve" to express all the possible ways in which the *Gillibrand* estate might either descend from father to son or devolve from brother to brother, in case of the remainder taking effect.

The next proposition is, that the words "the land devised by the will of *W. Gillibrand* to *T. H. Gillibrand* (the son) for an estate tail" are only a description of the lands, and the same as if the land was specified by the name of the fields. Let this be admitted *arguendi causâ*—a man may describe his lands by any definition he pleases. Suppose a man were to say by his will, that he devised his estate to *Ford*, upon condition that if *Arundel Castle and Park* should ever come to him, he should forfeit the estate devised. If the *Castle and Park* were separated, and the *Castle* only came to him, then, according to the argument for the defendant, the condition is fulfilled. Has the *Gillibrand* estate come to the plaintiff? It certainly has not. A vast number of acres have been sold, many have been exchanged, and there is 1800*l.*, the produce of a sale, uninvested in land. This defect in the argument for the defendant is attempted to be made good by appealing to the equitable doctrine, that equity will determine, that where money is directed to be laid out in land, it shall descend as land. That is a doctrine very good in a Court of Equity, but the case is now before a Court of Law. In discussing the intention of a testator, a Court of Law never considers money as land and land as money, unless that is precisely expressed in the will itself; and even then money cannot be made to descend to the heir at law. This is the first time that it has ever occurred that a Court of Law has been called upon to lay down a rule, where an estate which is to devest another, has

(a) So, if the first donor had died without issue; for though the brother in that case would have been their general, he would have taken, not as heir but as remainder-man, as in the case supposed.

not descended modo et formâ. If the allusion in the will of Colonel *Fazakerley* to the will of *William Gillibrand* is only to describe the property, the clause must be read thus: "I leave you this estate in tail male with remainder over in strict settlement, provided, that if a certain estate called Chorley Hall with 100 acres of land, formerly held by *William Gillibrand*, shall ever descend or devolve upon any one of you, then my estate shifts." Instead of this being the Chorley property, the whole has been sold and converted into another estate. Unless the Court is prepared to go the length of saying that no extent of substitution would make a difference, judgment must be given for the plaintiff. It is said that it is absurd to suppose that the shifting clause was inefficient when first it was penned. If a testator does not know how the family settlements affect his estate, or affect the estates of those to whom he leaves property, he may often put in clauses wholly inefficient. It is not a novel circumstance for a man to die and leave many lapsed legacies. It has been said, that in the will of *William Gillibrand*, there is no forfeiture imposed upon the person who neglects to take the name of *Gillibrand*. It has been said, that where there is no limitation over of the estate after such a clause, the omission to take the name and arms may not work a forfeiture, because there is no one to forfeit the estate to; but on the other hand, it has been put as a matter of doubt that the heir at law might enter for the breach of the condition. A cautious conveyancer, therefore, having that clause as to the name and arms in *Gillibrand's* will before him, might safely cause Colonel *Fazakerley* to say, "I mean him to take the name and arms of *Fazakerley*, unless he forfeits his estate by not keeping some other surname." Supposing the Court do presume the fact that Colonel *Fazakerley* had read the settlement in 1801, and knew all the powers contained in it, it does not follow that it is to be presumed that he knew of all the subsequent changes in the property. The settlement is in 1801, the will is made in 1804. Between that year and 1813,

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the estates are sold to a considerable extent; part of the money is invested on mortgage, and part in the purchase of new estates. Why is this Court to presume that Colonel *Fazakerley* knew of all the changes subsequent to the making of his will? If the Court do so hold, the consequence will be, that a precedent will be furnished authorizing a presumption that a testator knew every change that possibly might take place. It is said the Court must look at the condition of the testator's family at the time he made his will. The *Gillibrands* were not of the family of *Fazakerley*. Why look at the condition of another family? The *Gillibrands* were certainly the relations of Colonel *Fazakerley*. But it has never yet been decided that when a testator is making his will, the Court is bound to presume that he knew of the condition of another family, (although they may be his relations,) and the state of all the titles to their estates. It is certain that the testator has referred to the will of *William Gillibrand*, and he has stated a particular devolution of the estate under that will, applicable at the moment when he wrote the will. For it refers to *T. H. Gillibrand* (the son), the then tenant in tail, as being tenant in tail under that will. This circumstance would naturally occur to a conveyancer who had before him a copy of the will; but is it to be presumed that in a will drawn with so much skill, there should be an omission of any reference to the settlement, if that were known to the party who drew the will? It cannot be supposed that care should be taken to describe the particular effect of the devise to *T. H. Gillibrand* (the son), as it then existed, and that there should be an omission of any reference whatever to the settlement. The operation of the will was alone in the contemplation of Colonel *Fazakerley*, and it is conceded that if that be so, there is an end of the case.

Thus with reference to the possession of the estates. It is admitted, that if the will is looked at generally, it does seem to suppose the possibility of a person being, during his minority, entitled to the rents and profits. For the

trustees have a power of leasing during the minority of such persons as shall be entitled to the rents and profits of the estate. In this particular clause these words are found, "and the person upon whom such hereditaments shall so descend or *devolve*, shall, under the trusts hereinbefore expressed or contained, be tenant or tenants in tail male of the hereditaments hereinbefore by me devised, so as to be then *actually in possession*" (a). The words are emphatic, and shew an intention to distinguish between a constructive possession and an actual possession, during minority, of the *Fazakerley* estate. A minor is not in the actual possession under the will of Colonel *Fazakerley*, though it might loosely and generally be said that by virtue of this will he is entitled to the rents and profits. Mr. *Fazakerley* the eldest son is under age, and therefore, whatever the construction or the shifting clause of the will might have been in other respects, the plaintiff is not in the precise condition the testator required him to be before the *Fazakerley* estates went from him.

The following certificates were afterwards returned :

"This case has been argued before us and our brother *Taunton* by counsel; and upon the supposition that, according to the practice of the Court of Chancery, moneys produced by the sale of settled estates under a power of sale and exchange not yet actually invested in land, are yet to be considered as actually so invested, we are of opinion that under the will and codicils of the testator *Samuel Hawarden Fazakerley*, the plaintiff *Henry Hawarden Fazakerley* is now entitled in possession to the estates thereby respectively devised.

T. DENMAN.

J. PARKE.

J. PATTESON."

"This case has been argued before my Lord Chief Justice and my brothers *James Parke* and *Patteson* and myself by counsel; and upon the supposition that, according to the

(a) See the clause, *suprà*, 4.

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practice of the Court of Chancery, moneys produced by the sale of settled estates under a power of sale and exchange not yet actually invested in land, are yet to be considered as actually so invested, I am of opinion, that under the will and codicils of the testator *S. H. Fazakerley*, the plaintiff *H. H. Fazakerley* is *not* now entitled in possession to the estates thereby respectively devised.

W. E. TAUNTON" (a).

(a) As to clauses in wills and deeds shifting the estate upon the accession of other property, or requiring the assumption of a sur- name and the use of particular arms, see Mr. *Butler's* note 283 to Co. Litt. 327, *Hayes' Principles*, 148.

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A purchaser who in his written contract stipulates for a good title, cannot be required to complete the purchase upon a defective title on the ground of a verbal waiver of the stipulation for a good title.

ASSUMPSIT for the purchase money under an agreement for the sale of real estate. First count, averring a good title; second, a good title except as to part, as to which defendant waived and dispensed with the production of further title. At the trial before *Gaselee, J.*, at the Buckingham spring assizes, 1832, the following facts appeared.

Certain garden ground being advertised by the plaintiff for sale by auction, the defendant went with *Hatten*, the plaintiff's attorney, to see the property, and agreed to purchase by private contract, agreeably to the conditions of sale. A written agreement was immediately executed, and a deposit made by the defendant. The fifth condition of sale, and one of the terms of the agreement, was, that the vendor should produce a good title to the premises. A few days after the execution of this agreement, the defendant requested *Hatten* to act for him as well as for the vendor, with which *Hatten* complied. *Hatten* then informed the defendant that there was a defect in the title which could not be cured, but that other purchasers had

completed their purchases. After *Hatten* had mentioned to the defendant the circumstances out of which the defect in the title arose, the defendant said he would not object to the title on the ground of that defect, and that he would take the land. *Hatten*, as solicitor to the defendant, also waived the defect. On the 29th Sept. 1830, possession was delivered to the defendant. In September, 1831, the abstract of title was sent to the defendant at his desire, and in the following November the defendant's solicitor objected to the title that it was defective in the respect above alluded to, and the defendant refused to complete the purchase. The learned judge admitted evidence of the parol waiver of the objection to the title, and a verdict was found for the plaintiff, with liberty, however, reserved to the defendant to move to enter a nonsuit in case the Court should think the evidence inadmissible. In Michaelmas term, *Storkes Serjt.*, obtained a rule nisi for a nonsuit; against which, in Easter term last,

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F. Kelly, Winthrop Praed, and W. H. Watson, shewed cause. The question for the opinion of the Court is, whether that part of the stipulations of a written contract not under seal, which relates to the production of a good title, can be waived by parol. It seems quite clear that by law it may be so; though it is admitted that parol evidence of any thing which occurred before or at the time the written contract was entered into, cannot be received to vary such contract. In the cases of *Preston v Merceau*, executor (*a*), *Meres v. Ansell* (*b*), and *Haynes v. Hare* (*c*), in which the Court refused to admit parol evidence to vary a written contract, the evidence offered was of facts contemporaneous with the making the agreement which was reduced into writing. The agreement, though in writing, is not a deed. One of the stipulations in the contract is for the production of a good title. A good title is deduced

(a) 2 W. Bla. 1249. (b) 3 Wils. 275. (c) 1 H. Bla. 659.

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except as to a particular part, and a new agreement is entered into, in which the purchaser agrees to waive all objections to the title in respect of this particular defect. Both these agreements are equally parol and of equal force at common law. In *Starkie* on Evidence (a), it is said, "It is a general rule, that where an agreement has been reduced to writing, evidence of oral declarations made at the same time shall not be admitted to contradict or alter it. A written agreement, however, where it is not under seal, may be altered by the addition of new terms, by an oral agreement, which in fact constitutes a new agreement, incorporating the former one, or as has been seen, such an agreement may be wholly discharged by parol, before any breach has occurred," and the case of Lord *Milton* v. *Edgworth* (b) is referred to. In *Phillipps* on Evidence (c), many cases are cited, and the rule in equity is laid down. It is there said, "the defendant may be admitted also to prove by parol evidence, that after signing the written agreement, the parties made a verbal agreement varying the former; provided these variations had been so acted upon that the original agreement can no longer be enforced without a fraud upon the defendant." It would be a fraud upon the plaintiff in this case, if the defendant, after having been informed of the defect and of the facts out of which it arose, and having notwithstanding taken possession and exercised his ownership, should depart from his contract. This case is stronger in every circumstance than that of *Legal* v. *Miller* (d), referred to in *Phillipps* on Evidence, in which the Court allowed a party to set up a subsequent parol agreement to vary a written contract. That which is not under seal, the common law treats as merely parol; whether it be verbal or reduced into writing is immaterial. This being so, it would be most inconvenient if the parol, i. e. unsealed writing, could not be waived by a subsequent oral agreement. It is the common course to

(a) First edition, 1002 (s).

(first edition.)

(b) 1 Bro. P. C. 2d edit. 519;

(c) 5th edition, page 577.

but referred to as 6 Bro. P. C. 587,

(d) 2 Vez. sen. 299.

waive objections to title, which the party considers not very material, by word of mouth. The statute of frauds does not affect this question. The cases which have been decided upon that statute do not apply. It is not intended here to give evidence entirely to set aside the contract, but merely to shew a waiver of some trifling part of it. It cannot be said that by admitting the parol evidence offered in this case, the object of the statute of frauds would be defeated. If it be considered that this agreement to make out a good title must by reason of the statute be necessarily in writing, yet that act contains no clauses from which it can be inferred that such a stipulation may not be vacated by parol. It seems quite clear that a contract in writing may be totally abandoned by parol; and if the parties can vacate the whole, *a fortiori* they can waive a part. The stipulation for the production of a good title, is in the nature of a mere condition precedent to the agreement for the purchase of land, to be performed by the vendor, and capable therefore of being waived by the vendee. In almost every case there is a verbal alteration as to the time for completing the purchase, but it has never been held that the party therefore cannot enforce the contract.

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Storkes, Serjt. and Follett, contra. The defendant is entitled to a nonsuit on the ground of the improper admission of evidence of the parol waiver. The effect of admitting the evidence in this case would be to introduce all the mischiefs which the statute of frauds was intended to prevent. No case, either in law or in equity, has gone so far. The rules of evidence are invariably the same in the courts of law and in equity (a). Evidence is not admissible in a Court of Equity to vary a written agreement. The contract in this case was, that the defendant was to have a good title; and the contract now attempted to be set up is, that he is to take the land with a defective title. A contract in writing

(a) *Sugd. Vend.* 7th edition, 136.

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may be wholly abandoned by parol, but cannot be varied. In *Buckhouse v. Crosby* (a) Lord *Hardwicke* observed, that the statute of frauds requires that all contracts and agreements concerning land should be in writing. Now an agreement to waive a purchase contract is as much an agreement concerning lands as the original contract. Upon this it is observed by Sir *Edward Sugden* (b), that notwithstanding this observation of Lord *Hardwicke* it is universally considered, that an agreement in writing concerning land may be discharged, although it cannot be *varied*, by parol. And in a late case, where all the authorities were mentioned, but in which it was not necessary to decide the point, the Master of the Rolls appeared to consider that a written agreement might be abandoned by parol, *Price v. Dyer* (c); *Lewis v. Jones* (d), *Thellusson v. Woodford* (e), *Clinan v. Cooke* (f). A number of decisions in the courts of equity have been cited on the other side. In all those cases the defendant gave in evidence a parol abandonment of the contract which the plaintiff sought to enforce, in order to show that the plaintiff was not entitled to relief by a court of equity. That is very different from this case. Here, the plaintiff is attempting to *enforce* a contract partly written and partly verbal. Such a contract a court of equity would not compel a defendant specifically to perform. After an examination of all the cases, Sir *E. Sugden* thus sums up the law on the subject (g): "The result of the authorities as to a parol variation of a written agreement appears to be,—1. That evidence of it is totally inadmissible in law. 2. That in equity the most unequivocal proof of it will be expected. 3. That if it be proved to the satisfaction of the Court, and is such a variation as the Court will act upon, yet it can only be used as a defence to a bill demanding a specific performance, as it is inad-

(a) Eq. Ca. Abr. 32, pl. 44.

& Ryl. 567.

(b) Sugd. Vend. 7th edit. 134.

(c) 4 Ves. jun. 326.

(c) 17 Ves. jun. 356.

(f) 1 Scho. & Lef. 22.

(d) 4 B. & C. 506, 514; 6 Dowl.

(g) Sugd. Vend. 7th edit. 139.

missible as a ground to compel a specific performance: unless, 4thly, there has been such a part performance of the new parol agreement as would enable the Court to grant its aid in the case of an original independent agreement, and then, in the view of equity, it is tantamount to a written agreement. It is clear, upon the evidence of Mr. *Hatten* himself, that the defendant did not understand what was the defect in the title which he agreed to waive; and therefore the Court will be the more willing to enforce a strict compliance with the provisions of the statute of frauds. [*Parke, J.* In *Cuff v. Penn* (a) the time for performing the contract was extended by parol; and it does not appear that there was any part performance of the contract. *Littledale, J.* Many actions have been brought for the non-performance of a contract, where the time has been extended by parol, but I could never understand upon what principle.]

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F. Kelly referred to *Warren v. Staggs* (b) and *Williams v. Jones* (c).

In the course of this term the judgment of the Court was delivered by

DENMAN, C. J., (who, after stating the facts of the case, thus continued.)—By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve,

(a) 1 M. & S. 21.

(b) Cited 3 T. R. 591.

(c) 7 Dowl. & Ryl. 549; 5
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or annul the former agreement, or in any manner to add to or subtract from, or vary or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement. And if the present contract had not been subject to the control of any act of parliament, we think that it would have been competent for the parties, by word of mouth, to dispense with requiring a good title to be made to the lot in question, and that the action might be maintained. But the statute of frauds has made certain regulations as to contracts for the sale of lands, and enacts (section 4), "that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning the same, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized." It is to be observed, that the statute does not say, in distinct terms, that all contracts or agreements concerning the sale of lands shall be in writing: all that it enacts is, that no action shall be brought unless they are in writing, and as there is no clause in the act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, so as to prevent either party from recovering on the contract which was in writing. It is not, however, necessary to give an opinion on that point, as this is not a waiver and abandonment of the whole written agreement, but only of a part of it; and the question is, what is the effect of that? It has been said by the plaintiff that this does not in any degree vary what is to be done by either party; that the same land is to be conveyed, there is to be the same extent of interest in the land, and it is to be conveyed at the same time, and the same price is to be paid, and that it is only an abandonment of a col-

lateral point. But we think that the object of the statute of frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only. But in the present case the written contract is not that which is sought to be enforced; it is a new contract which the parties have entered into, and that new contract is to be proved partly by the former written agreement, and partly by the new verbal agreement. The present contract, therefore, is not a contract entirely in writing, and as to the title being collateral to the land, the title appears to us to be a most essential part of the contract; for if there be not a good title the land may in some instances better not be conveyed at all. But our opinion is not formed upon the stipulation about the title being an essential part of the agreement, but upon the general effect and meaning of the statute of frauds, that the contract now brought forward by the plaintiff is not wholly a contract in writing. We do not say that verbal evidence may not be given of customs and usages applicable to the subject-matter of the written contract, where the contract is silent: that has been done in a great variety of instances. Whether the plaintiff may not have relief in a court of equity we give no opinion: it would be for the Court to decide upon the case which should be brought before them. There have, however, been some cases at law on contracts within the statute of frauds, where verbal evidence has been allowed; *Warren v. Staggs*, cited in *Settler v. Holland (a)*, *Thresh v. Rake (b)*, and *Cuff v. Penn (c)*. These were cases where the time for the performance of the contract had been enlarged by a verbal agreement, and the decision proceeded on the ground that the original contract continued, and that it was only a substitution of different days of performance. It is not necessary to say whether these cases were rightly decided. If they were so, still the present is a different case; for

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(a) 3 T. R. 591.

(b) 1 Esp. N. P. C. 53.

(c) 1 M. & S. 21.

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here, without doubt, the terms of the original contract were varied. This rule must therefore be made absolute for a nonsuit.

Rule absolute (a).

(a) And see *Brodie v. St. Paul*, 1 Ves. jun. 326; *Pym v. Blackburn*, 3 Ves. jun. 40, n.; *Wills v. Stradling*, *ibid.* 378; *Forster v. Hall*, *ibid.* 696, 712; *Boydell v. Drummond*, 11 East, 142, and 2 Campb. 157; *White v. Matteson*, 2 Stark. N. P. C. 325.

SWEETAPPLE V. JESSE.

Where in an action for slander the declaration alleged that the defendant had said of the plaintiff that he had set fire to his own premises, innuendo that the plaintiff had been guilty of wilfully setting fire to the premises which, whilst in his occupation, had been destroyed by fire, it was held on motion in arrest of judgment, that the Court could not after verdict presume that the jury had found that the defendant meant to impute to the plaintiff that he had done it *unlawfully* or *feloniously*, as well as *wilfully*.

Nothing more will be presumed after verdict, than was necessary to support the allegations in the declaration, (b)

(b) Vide *Fisher v. Clement*, 1 Mann. & Ryl. 281.

fire as aforesaid, in the presence and hearing of one *Edsay* and divers others, spoke the false &c. words following; that is to say, "have you heard the report about the fire at Charlton?" (thereby meaning the fire by which the premises so in the occupation and possession of the plaintiff had been destroyed;) and upon the defendant's being asked "what report?" he the defendant then and there answered and spoke, and published in the presence of *Edsay* and the others, of and concerning the plaintiff, and of and concerning the said premises which had been so destroyed by fire as aforesaid, the false &c. words following, *i. e.* "why, that young *Sweetapple* (meaning the plaintiff,) has set his own premises on fire;" thereby then and there meaning that the plaintiff had been *guilty of wilfully setting fire to the said premises* so in his occupation and possession as aforesaid. [The charge was slightly varied in other counts.] By means of the speaking and publishing of which said several false, scandalous, malicious, and defamatory words the plaintiff had been injured in his reputation; and divers persons had, and still did suspect and believe him to have been a person guilty of wilfully setting fire to his premises, so as aforesaid charged upon and imputed to him, and by reason thereof refused to have any transaction, acquaintance, or discourse with the plaintiff as they were before used and accustomed to do. Plea, the general issue. At the trial before *Taunton, J.*, at the Hampshire summer assizes, 1832, the plaintiff obtained a verdict, damages 50*l.* In Michaelmas term following *Dampier* obtained a rule nisi for arresting the judgment; against which

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Merewether, Serjt., and Follett, now shewed cause. It is presumed that the rule was obtained on the ground that a party may innocently set his house on fire, and that therefore the charging the plaintiff with setting his house on fire is not actionable, unless it be charged to have been done with an intent to injure the property of others. After

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verdict, however, the allegation contained in the declaration, that by the words "young *Sweetapple* has set his own premises on fire," the defendant meant that the plaintiff had been *guilty of wilfully setting fire* to the premises, is sufficient to maintain the verdict. It is not necessary that it should have been stated to have been done *feloniously*. The words are to be construed in the manner in which they are usually understood. The innuendo here is, *guilty of wilfully setting his premises on fire*. In the case of *Peake v. Oldham* (a), the colloquium was of and concerning the death of one *Daniel Dolly*, and the words were, "you are a bad man, and I am thoroughly convinced that you are guilty (meaning guilty of the murder of the said *Dolly*.) and rather than you should want a hangman, I will be your executioner." There it was argued that there were many innocent ways in which a man may cause the death of another, as in the case of a physician, reported in 2 *Bulstrode*, 10, 11 (b), and that therefore the words "guilty of the death," do not of themselves necessarily import a charge of murder. But Lord *Mansfield*, with whom the other judges agreed, said that these words amounted to a charge and imputation of a very foul and heinous kind, and that the word 'guilty' implies a malicious intent, and can be applied only to something which is universally allowed to be a crime. [*Denman*, C. J. There, in the words of the slander itself the plaintiff is charged with being 'guilty.' Here, the expression occurs only in the innuendo.] After verdict the Court will assume that the words were spoken in the sense imputed to them by the innuendo. Lord *Mansfield*, in his judgment in the case which has been already referred to, says, "where it is clear that the words are *defectively* laid, a verdict will not cure them: but where, from their general import, they appear to have been spoken with a view to defame a party, the Court ought not to be industrious in putting a construction upon them.

(a) 1 Cowper's Reports, 275.

(b) *Miller v. Buckdon*.

different from what they bear in the common acceptation and meaning of them." And his lordship referred to a case in which the Court, upon motion in arrest of judgment, held words actionable, 'because from the whole frame of them they were spoken by way of imputation.' In this case the whole frame and form of the words shew that it was meant to impute to the plaintiff a crime. [*Parke, J.* Might not all the innuendos be believed and yet impute no crime? The plaintiff might have set fire to his house *wilfully*, but it does not appear that there was an intention to commit a fraud upon another person.] [*Patteson, J.* It is not said to have been done *unlawfully*. It might be done *wilfully* without being an *unlawful* or *criminal* act. Upon the record there is nothing beyond an imputation that the plaintiff *wilfully* set his house on fire.] In the case of *Avery v. Hoole* (a), which was an action against an unqualified person for using a gun, the declaration merely stated that the defendant used a gun, being an *engine for the destruction of game*. [*Patteson, J.* It must have been stated that he was a person not qualified.] That does not appear. It was objected in arrest of judgment, that it was not averred that the defendant *used* the gun for the destruction of game, and this objection the Court over-ruled; Lord *Mansfield* observing that such an ambiguity, though it might be good cause of special demurrer, or an objection to a conviction, was cured by verdict. The point cannot be whether the declaration has been technically drawn, for all defects in point of form are cured by verdict; but whether after trial, the judge having told the jury what the words meant, and the jury having found a verdict for the plaintiff, the Court will not presume that the house was in a town, and that thus the wilfully setting fire to it was criminal, or that it was proved that the defendant meant to charge the plaintiff with a fraudulent intent. If the charge is consistent with the guilt of the party, the

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(a) In a note to 2 Douglas, 689.

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Court will not after verdict arrest the judgment. In a note by Serjt. *Williams* to 1 *Saund.* 228, it is said "where in debt for rent by a bargainee of a reversion the declaration omitted to allege the attornment of the tenant which before the stat. 4 *Anne*, c. 16, s. 9, was a necessary ceremony to complete the title of the bargainee, and upon *nil debet* pleaded there was a verdict for the plaintiff, such omission was cured by the verdict by common law," and the case of *Hitchins v. Stevens* (a) is cited. [*Patteson*, J. In the case of *Jackson v. Pesked* (b), it was held, that where in an action by a reversioner for an injury to his reversion, the facts stated in the declaration do not necessarily shew that the reversion was prejudiced, and the plaintiff does not allege that his reversionary estate was damaged, the judgment ought after verdict to be arrested. *Parke*, J. All that we can say after the verdict, upon looking at this declaration, is, that the defendant meant to impute to the plaintiff that he set his house on fire *wilfully*.] In *Collins v. Gibbs* (c), the distinction between demurrer and arrest of judgment is pointed out. There the Court held, that where the plaintiff had omitted to allege performance of that which was a condition precedent to be performed on his part, the defect could not be supplied upon demurrer or motion in arrest of judgment by default, but only where the objection is made after verdict; and that this was the criterion by which to know whether or not such defects could be supplied.

The wilfully setting fire to a man's own premises might be a misdemeanor for which he would be punishable by law; *Hawkins*, Pleas of the Crown, c. 39, s. 3: and the Court will after verdict assume those circumstances to have been proved which render such wilful burning criminal.

DENMAN, C. J.—It would be quite necessary to go the whole length of Mr *Follett's* argument, "that it is sufficient if the charge made by the defendant is consistent with the

(a) T. Raym. 487, 2 Show. 233. (b) 1 M. & S. 234. (c) 2 Burr. 899.

guilt of the party" in order to sustain this verdict. This however, I think, we cannot do. All matters that are necessarily involved in the allegation contained in the declaration, must be presumed after a verdict for the plaintiff, but we cannot presume that there was proof of all those circumstances which are necessary to warrant the verdict, and which are not inconsistent with the allegations in the declaration.

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LITLEDALE, J.—I am of opinion that the judgment must be arrested. In order to support the action it would have been necessary for the plaintiff to allege and prove that the house in Charlton was contiguous to other houses, or that it was intended to impute to the plaintiff that the setting fire to the premises was done in fraud of others. The words, however, which were used, may have been used consistently with a supposition that the plaintiff's intention was perfectly innocent.

PARKE, J.—I am entirely of the same opinion. If the fact had been that the house was near to others, it would have been a misdemeanor wilfully to have set it on fire; but at common law this must have been alleged upon the record. So if the house was insured, and it had been intended to impute to the plaintiff that he had done this in fraud of his insurers, this should have been alleged upon the record. So if the burning was by a tenant, and it was meant to be imputed to him that he set fire to the premises with intention to injure his landlord, this also must have been alleged upon the record. All that the plaintiff in this case alleges that the defendant intended to charge him with is, that he wilfully set fire to his own premises. After verdict, every thing that is necessary to be proved in order to support the allegations of the declaration must be taken to have been proved. Here, we must take it to have been proved that the defendant intended to charge the plaintiff with having set fire to his premises *wilfully*, but we are not by the verdict called upon to presume any thing further.

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PATTERSON, J.—I am entirely of the same opinion. The judgment ought to be arrested. The declaration should at all events have averred that the defendant meant to impute to the plaintiff that he had been guilty of unlawfully or feloniously setting fire to his premises; then after verdict we might have presumed that the jury found that it was intended to impute an unlawful or felonious intent. Here however there is nothing whatever in the declaration which shews that the imputation was of a felonious or unlawful intent.

Rule absolute.

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WALKER, deceased, v. ROBERT ROBERTS.

By an indenture reciting that *A.* has agreed to pay a debt owing from *B.* to *C.*, *A.* covenants with *B.* to indemnify *B.* in respect of such debt. *A.* omits to pay *C.*, who sues and obtains judgment against *B.* *B.* may recover the amount of the debt from *A.* before he has paid *C.*

COVENANT. The declaration stated that on 23 March, 1801, *Walker* by his writing obligatory became bound to *Ann Smith* in the penal sum of 1200*l.*, subject to a condition, whereby, after reciting that the said *Ann Smith* had paid a certain sum of money for the purchase of an annuity of 100*l.* for her life payable quarterly, the condition of the bond was declared to be, that *Walker*, his heirs, executors, administrators and assigns, should pay unto the said *Ann Smith*, her executors, administrators and assigns, one clear annuity of 100*l.* to commence from the 25th March then instant, and to be payable, during her life, by four quarterly payments, on &c.: That on 10th December, 1807, a certain indenture of bargain and sale was made between *Walker* of the first part, the defendant of the second part, and *William Roberts* and *John Roberts* of the third part, and sealed with the seal of the defendant, and duly inrolled within six months, by which indenture, after reciting that *Walker* was seised of certain freehold messuages, &c. thereafter granted &c. in fee, and certain leasehold messuages, &c. thereafter assigned, and of their respective appurtenances, but that the same were subject to the several mort-

gages, payments, and other incumbrances mentioned in the first schedule to the said indenture, and that *Walker* was indebted to the several persons named in the second schedule to the said indenture, in the several sums set opposite to their respective names, and that *Walker* had proposed to the defendant to convey and assign to him the said freehold and leasehold hereditaments &c. and that the defendant should, in consideration thereof, pay and discharge the several mortgages and sums of money mentioned in the second schedule, and should pay and secure to be paid by the joint and separate covenants of the defendant, *W. Roberts* and *J. Roberts*, an annual sum of 200*l.* to *Walker*: And that the defendant had agreed to comply with the said proposal: The indenture witnessed that in consideration of said annual sum of 200*l.* by the defendant, *W. Roberts* and *J. Roberts* covenanted to be paid to *Walker*, and of 5*s.* paid &c. *Walker* did grant, bargain &c. unto the defendant the said freehold and leasehold hereditaments, &c. that is to say, All that &c. habendum to the defendant and his heirs, subject to the several incumbrances &c. in the several schedules mentioned, as far as the same were chargeable thereon: And that the defendant did thereby covenant with *Walker*, amongst other things, that the defendant, his heirs &c. should and would at all times thereafter well and sufficiently *save, protect, defend, keep harmless and indemnified* said *Walker*, his heirs, executors, administrators and assigns, and his and their goods and chattels, estate and effects, from and against the payment of the several sums of money mentioned in the said schedule or any of them, and of, from, and against all actions, suits, claims or demands, for and upon account of the same or any of them: That the annuity of 100*l.* was mentioned in the said second schedule, and the same then and there was and from thenceforth continued to be a sum of money, against the payment of which the defendant had so covenanted to *save, protect, &c.* *Walker*, his executors &c. as aforesaid: That afterwards and in the lifetime of *A. Smith*,

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on 25 December, 1829, 500*l.* or the said annuity of 100*l.* for five years, which expired on that day, became due to *A. Smith*, and is still unpaid, contrary to the condition of the said writing obligatory: That afterwards, on 1st November, 1829, *Walker* died, after whose death, on 9th November, in the same year, administration was granted to the plaintiff. Of all which premises the defendant had notice. Breach, that the defendant had not paid, though requested, the said sum of 500*l.* or any part thereof, to *A. Smith*, or saved, protected, &c. *Walker*, his executors, administrators, &c. and his and their goods &c. from and against the payment of said sum of money before mentioned in said schedule, and of, from, and against all actions &c. for or upon account of the same, but had wholly neglected &c. by reason whereof the bond became forfeited, and an action accrued to *Ann Smith* against the plaintiff as administratrix. That *Ann Smith* having, after the making of the bond, married one *G. Brooke*, and since become a widow, in Hilary term, 1830, commenced and prosecuted an action in K. B. against the plaintiff as administratrix, for recovery of said sum of 1200*l.* the penalty of said bond so forfeited as aforesaid, and obtained judgment against plaintiff for said 1200*l.* and 7*l.* for her costs, to be levied as to 20*l.* of the goods acknowledged &c. and as to the residue of other goods, quando accidissent. That the plaintiff as such administratrix was afterwards on 20 April, 1830, obliged to pay said sum of 20*l.*, and put to costs amounting to 50*l.* in defending the said action. Of all which several premises the defendant had notice, et sic &c. Profert of the letters of administration.

Pleas. 1st. That defendant has paid the arrears of the said annuity to *Ann Smith*, and had well and sufficiently saved, protected, &c.

2d. That if the plaintiff has been damnified, she has been so damnified of her own wrong.

3d. That the plaintiff is not, nor ever was administratrix of the goods &c. of *Walker*, deceased.

The replication joins issue upon 1st plea, and takes issue on 2d and 3d pleas. At the trial before Lord *Tenterden*, C. J. the plaintiff produced the letters of administration which were at that time unstamped, there having been no effects come to the hands of the plaintiff, as administratrix, to the value of more than 20*l.* *J. Williams*, for the defendant, objected, that there being no stamp on the letters of administration, the plaintiff could not recover upon the covenant, and cited *Hunt*, administrator, v. *Stevens* (a). The learned judge being of this opinion, nonsuited the plaintiff.

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In Michaelmas term, 1831, this Court granted a new trial upon payment of costs by the plaintiff. And upon the second trial, before *Denman*, C. J. at the Middlesex sittings after Michaelmas term, 1832, a verdict was found for plaintiff, damages 534*l.* with leave to move to reduce the damages to 34*l.* In Hilary term last *Coltman* obtained a rule accordingly, against which

Campbell, S. G. and *White*, shewed cause. It is contended that inasmuch as the covenant is only to indemnify *Walker*, his heirs, executors, administrators and assigns, the plaintiff is entitled to recover from the defendants no more than she has been actually obliged to pay to the annuitant. But though in terms the covenant is only to save, protect, defend, keep harmless and indemnified *Walker*, his heirs &c. from the payment of the several sums mentioned in the schedule, yet the Court will imply an absolute covenant to pay these sums. In *Sampson v. Easterby* (b), there was a lease of certain mines which contained a recital of an agreement made by the lessee with the lessor for pulling down an old smelting mill, and building another of larger dimensions, and the lease contained a covenant to keep such new mill in repair, and so leave it at the expiration of the term; but did not contain a covenant to build it. It was held that such a covenant was to be implied. This case has

(a) 3 Taunt. 113.

(b) 9 B. & C. 505; 4 M. & R. 422.

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been affirmed in error. Lord *Tenterden* there said, "Two questions were made; first, whether the deed did contain, according to its true construction, a covenant to erect those buildings;" and his lordship upon this point said, "It appears evidently to have been the intention of the parties that the building should be erected; and as no precise form of words is necessary to make a covenant, we think the recital of the agreement, that the building should be erected, followed by the express covenant to maintain and leave it, do amount to a covenant in law to erect the building." In this case there is a recital of an agreement, that the defendant should pay and discharge the several mortgages and sums of money mentioned in the schedule, which is followed by the agreement to indemnify. Upon the authority of *Sampson v. Easterby*, and *Saltoun v. Houston* (a), which is commented upon at great length in *Sampson v. Easterby*, the Court will consider that in this case also there is a covenant in law to pay the whole amount of the various debts mentioned in the schedule. If *Walker* had been alive he would have recovered from *Roberts* the whole amount, and if so, surely his administratrix can do the same.

Coltman, in support of the rule. The covenant was merely to indemnify against any injury which *Walker* or his representatives might sustain by reason of the nonpayment by the defendant of the debts mentioned in the schedule. The covenant is, that the defendant shall save, protect, defend, keep harmless and indemnified *Walker* and his heirs, &c. and his and their goods &c. from and against the payment of the several sums of money mentioned in the schedule, and against all actions, claims and demands in respect of the same. Could this action have been maintained if the plaintiff had never been sued at all? The action by an executor is only maintainable in respect of damage done to the personal estate. Here, the per-

(a) 1 Bingh. 433.

sonal estate has not suffered to a greater amount than the 34*l*. The annuitant may sue the heir upon this bond, and the defendant may perhaps be called upon a second time. The plaintiff is not entitled to recover for the purpose of appropriating it to her own use, or of distributing it amongst creditors. She can only recover for the purpose of recouping any damage to the personal estate, and there is no damage to the personal estate until the money is levied upon it. [*Parke, J.* The covenant relates to the personal estate, and the very breach of it is a damage to the personal estate.] The declaration does not state that the defendant has not paid the sums mentioned in the schedule, but only alleges that he has not saved, protected, defended, kept harmless, and indemnified the plaintiff.

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LITLEDALE, J.—It seems to me that the plaintiff is entitled to recover the full amount under this covenant. The declaration states the bond by which *Walker* and his representatives became liable, in the penal sum of 1200*l*. in case a certain annuity should not be paid; that afterwards an indenture was made between *Walker* and the defendant, and *W. Roberts* and *J. Roberts*, which recited that *Walker* was possessed of certain estates which were subject to certain incumbrances mentioned in the schedule to the deed, and that *Walker* was indebted to the other persons mentioned in the second schedule, and that *Walker* had proposed to the defendant to convey to him the said estates, and that the defendant should, in consideration thereof, pay and discharge the several mortgages and sums of money mentioned in the schedule, and that the defendant had agreed to comply with such proposal. Then the deed says, that in pursuance of such agreement *Walker* conveyed to the defendant subject to the incumbrances, and that the defendant covenanted with *Walker* and his representatives well and sufficiently to save, protect, defend, keep harmless and indemnified *Walker* and his heirs &c. against the payment of the sums of money mentioned in the schedule; and that this annuity was

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mentioned in the schedule. As far as the express covenant goes, it might be doubtful whether any more could be recovered than the sum which has been actually paid by the administratrix; but the former part of the deed shews that the defendant had agreed to pay the several debts in the schedule, and therefore we must construe this into a covenant to pay, according to the terms of his agreement. The declaration proceeds to say, that the annuitant married *Brooks*, became a widow, and afterwards brought an action against the present plaintiff, in which she recovered the amount of the penalty of the bond by which the annuity was secured. All this arises from the act of the defendant in not paying the five years' annuity as he ought to have done. The plaintiff, therefore, ought to recover against the defendant, it having been through his default that she became liable. The money will not be put by the plaintiff into her own pocket, since the annuitant has brought an action and recovered against her 500*l.* and costs. In addition to this, she has paid 20*l.* I therefore think that the plaintiff is entitled to recover the whole amount for which the verdict was given, and that the rule must be discharged.

PARKE, J.—I am of the same opinion. Looking at the indenture I think it contains two covenants. The first is to indemnify *Walker* and his representatives, and the second is to pay the debts mentioned in the schedule to the deed. I have great doubt whether the former of these covenants is not sufficient to entitle the plaintiff to recover the whole amount. If that be not sufficient, then the other may be resorted to. This is a personal contract touching personal property, not dying with the testator, and therefore surviving to the administratrix. This case somewhat resembles one which has been before us.

PATTESON, J.—I am entirely of the same opinion. I think there is an express covenant not only to indemnify, but also to pay. Mr. *Coltman* says that the declaration does not say that the defendant has not paid, but the declara-

tion says, that he has not protected the plaintiff, so that there is a breach assigned of the covenant to *indemnify*. I have no doubt that this deed contains also a covenant to *pay*. The only argument which can be advanced on the part of the defendant is, that the plaintiff, after having recovered, *may* make an improper use of the money; but this is not sufficient.

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Rule discharged.

WILLIAMSON v. GARRATT.

ASSUMPSIT on a bill of exchange. At the trial before *Patteson, J.*, at the last Bristol assizes, it was objected that the bill was not properly stamped, for that it was dated on a certain day, payable at two months after date, and stamped accordingly; whereas in fact it was delivered by the drawer to the agent of one *Harris*, a week before the day of the date. It was urged that the bill was to be considered as issued when it was delivered to *Harris's* agent, and that if issued at that time, it was a bill payable at more than two months after its issuing, and therefore the stamp should have been higher, that is to say, three shillings and sixpence instead of two shillings and sixpence. The learned judge upon this nonsuited the plaintiff, giving him leave to move to enter a verdict.

A bill of exchange purporting to be payable two months after date, is properly stamped with the duty imposed on bills payable at two months after date, though it be issued before the day on which it bears date.

In Michaelmas term following *Follett* obtained a rule nisi for setting aside the nonsuit and entering a verdict for the plaintiff; against which

Merewether, Serjt. and Crowder, now shewed cause. It was quite clear, in point of fact, that this bill was issued and handed over to the agent of *Harris*, and by him given to *Harris* at least a week before the date. Upon the face of it, it is a bill payable at two months, whereas in fact it was a bill payable at more than two months. The schedule

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to the Stamp Act^(a) speaks only of bills payable at two months or exceeding two months after *date*, without alluding to the time of issuing, but it is clear from the body of the act, that the legislature intended that the regulations of the act should have reference to the time of issuing, rather than the day of the date. This appears from the 12th section of the act^(b). In *Upstone v. Marchant* ^(c), a similar objection upon the Stamp Act had been taken, and was overruled by Lord *Tenterden*, whose ruling the Court afterwards refused to disturb. But it may be made a question, whether that overruling was correct. The 12th section does not appear to have been noticed in that case. The question is, whether the word '*date*,' as used in the schedule, and upon which word alone the case of *Upstone v. Marchant* turned, is not by the 12th section shewn to have been used with reference to the time of issuing. In that case it does not appear that the bill was issued, as here, before the day of the date. The date, in case of a deed delivered or bill issued, is in itself immaterial, and is such only *prima facie* evidence that the delivery or issuing took place on that day. The actual time of delivery or issuing is always the material point to be considered. [*Parke, J.* Supposing the bill were payable at six months after date, and was not issued until three months after the day of the date, what would then be the consequence?] Until the bill is issued, it is in the power of the drawer to treat it as

(a) 55 *Geo. 3*, c. 184.

(b) The 12th section enacts, that if any person shall make and issue, or cause to be made and issued, any bill of exchange, draft or order, or promissory note, for the payment of money at any time after date or sight, which shall bear date subsequent to the day on which it shall be issued, so that it shall not in fact become payable in two months, if made payable after date, or in sixty days if made payable after sight, next after the

day on which it shall be issued, unless the same shall be stamped for denoting the duty hereby imposed on a bill of exchange and promissory note, for the payment of money at any time exceeding 2 months after date, or 60 days after sight, he, she or they shall for every such bill, draft, order or note, forfeit the sum of 100*l*.

(c) 2 B. & C. 10. S. C. per *nom* *Upston v. Marshall*, 3 Dowl. & Ryl. 198.

he pleases. In *Pasmore v. North* (a) where the question was, whether a payee of a bill of exchange post dated could convey a title to an indorsee, by indorsement anterior to the day of the date, the Court held that it was only necessary to refer to the date for the purpose of knowing the time at which the bill became payable. That case, it is true, turns upon a different point, and was decided before the passing of the present Stamp Act, but it shews that the material date is that of the issuing, and not that which appears upon the bill. If this had been a bill payable at two months, and without date, the time would have run from the issuing. This is a strong argument to shew that the time in all cases runs from the time of issuing. In pleading it is not necessary to mention the date, but merely to allege that the party, on a certain day, made his bill of exchange.

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Follett, contra, cited the case of *Johnson v. Garnett* (b), and was stopped by the Court.

By the COURT.—In the 12th section there is a distinction made between the date and the issuing; it speaks of a bill “which shall bear date subsequent to the day on which it shall be issued,” so that when the word ‘date’ is used in the schedule, it must be construed to mean the date appearing upon the face of the bill, and not the date of the issuing. We therefore think that the nonsuit must be set aside.

Rule absolute (c).

(a) 13 East, 517.

(b) 2 Chitty's Reports, 122.

(c) S. P. *Peacock v. Murrell*, cor.
Abbott, C. J. 2 Stark. N. P. C. 558.

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The sheriff or his officer cannot justify the removal of a prisoner to gaol within twenty-four hours from the time of the arrest, as upon a *refusal* to be carried to some convenient dwelling-house of his own nomination, without shewing that the prisoner was *requested* to nominate such dwelling-house.

DEBT for a penalty of 50*l.*, under 32 *Geo. 2*, c. 28, s. 1, for taking the plaintiff to gaol within twenty-four hours from the time of his arrest, the plaintiff not having refused to be carried to some convenient dwelling-house of his own nomination. At the trial before *Parke, J.*, at the York summer assizes, 1832, the following facts appeared:

The defendant (who is the keeper of the gaol for the liberty of Knaresborough, and the officer for executing writs within that liberty) arrested the plaintiff at Harrogate, about two miles from Knaresborough, and after keeping him three hours at an inn there, removed him to Knaresborough gaol. During his detention at the inn, the plaintiff behaved with great violence, and was obliged to be removed by force. No evidence was given to shew either that the plaintiff nominated a dwelling-house to which he wished to be carried, or that the defendant informed the plaintiff that he had the privilege of doing so. On this evidence, *F. Pollock*, for the defendant, submitted that the plaintiff had not made out his case, as it was incumbent on him to shew that he had nominated a dwelling-house. The learned judge thought that the act of parliament required the officer to ask the party arrested, whether he would nominate a dwelling-house, and only authorized him, in case of refusal, to carry the party to gaol within twenty-four hours, and as there was no proof of defendant having done so, he directed a verdict for the plaintiff.

In the following Michaelmas term, *F. Pollock* obtained a rule nisi for a new trial, on the ground of misdirection; against which

Knowles shewed cause. The question is, whether the words of the act of 32 *Geo. 2*, c. 28, s. 1, that "no sheriff's officer shall carry any person arrested by him to gaol within four-and-twenty hours from the time of such arrest, unless

such person so arrested shall *refuse* to be carried to some safe and convenient dwelling-house of his own nomination or appointment," require that the sheriff's officer shall inform the party arrested of the privilege which this statute gives him, or whether the party arrested must of his own accord nominate a dwelling-house, and demand to be carried there. The former is the true construction, and that which can alone give effect to the intention of the act. It is important to consider the purpose for which the act was passed. The preamble recites, that "many persons suffer by the oppression of inferior officers, in the execution of process for debt, &c." and goes on to declare, that for remedy thereof it may be reasonable to "make further provision for the ease and relief of debtors." Then follow a number of clauses, and among them the clause now before the Court, all in restraint of the officer and in ease of the party arrested. No doubt then the object of the act was to relieve debtors, and the Court is bound to give it such a construction as will best effectuate its intent. The language of the act also is material. The sheriff's officer is only authorized to take a party arrested to gaol within twenty-four hours, in case he *refuse* to be carried to a convenient house. The statute does not say, unless he omit or neglect, the only word made use of is "refuse." Then what is the meaning of the word *refuse*? It is to reject—to deny—not to accept. But how can a party be said to reject that which is not tendered, or not to accept that which is never offered for acceptance? The very use of the term necessarily implies the doing or refusing an act which the party knows it is in his power to do or to refuse. And if it be said that ignorance of the law shall not excuse, and that every one is presumed to know the law, at all events the maxim cannot hold here, for in this particular statute it is presumed that parties will be ignorant of its provisions, and care has been taken to guard against the consequence of that ignorance; for in the third section it is provided, that every sheriff shall deliver a printed copy of

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this clause of the act to all sheriffs' officers and bailiffs, and shall make it a condition of the bond into which such persons enter, to shew a copy of the said clause to every party whom they may arrest. There is no pretence in this case for saying that the defendant did shew a copy of the clauses to the plaintiff. If he had done so, the case might have worn a different appearance. It is clear, therefore, that the act contemplates that the bailiff shall inform the party arrested of his privilege; and there is no hardship upon the bailiff in adopting this construction. It only imposes upon him the necessity of doing that which, by the condition of his bond, he is in effect already bound to do. Besides, this point has been already decided. In *Dewhirst v. Pearson* (a), a case not yet reported, but which was argued last term before the Court of Exchequer, the point now in discussion came under the consideration of that Court. The learned barons took time to consider their judgment; and in the result unanimously determined that it was the duty of the sheriff's officer to call upon the party arrested to nominate. The language of Mr. Baron *Bayley* was, "he must be asked before he can refuse." The judgment in that case is decisive of this. There is no point of distinction, and if that decision be law, the judgment of the Court here must be for the plaintiff.

F. Pollock and *Dundas*, contra. One part of the case of *Dewhirst v. Pearson* (b) has not been read to the Court. Mr. Baron *Vaughan* says, "the other is a very grave question, (i. e. the same question that is now before the Court,) and I am by no means prepared to say that it was not the duty of the bailiff to put the question to the plaintiff whether he would nominate a place. I think the case should go down again for further inquiry, and the parties may put the matter upon the record if they think fit." This is the manner in which the case was disposed of. There is one point which does not appear to have been at

(a) Since reported 1 Crompt. & Mees. 365.

(b) Ibid. 374.

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all mooted in the Court, namely, that the penalty is very heavy. If the act meant to impose the penalty in such a case as this, it ought to have been clearly stated, and not left to inference or argument. There are many provisions in the act extending over several pages, and then at the 12th section the penalty is imposed upon every bailiff offending against this act, in a very loose manner. The Court will not hastily decide upon imposing the penalty in such a case. With regard to the duty of shewing the clauses to the party, that need not be done until the party arrested is in the house and requires meat and drink. With regard to the other question, from the moment that the party had endeavoured to make his escape from the officer, and thus put him in peril of forfeiting his bond to the sheriff—perhaps for the whole amount of his debt, the officer was entitled to take him at once to a secure place of custody, which a private house would not in such a case be. The party has by his illegal attempt forfeited his right to the protection of the act, and may at once be taken to gaol. In *Dewhirst v. Pearson*, the party arrested conducted himself in a peaceable manner, and therefore was entitled to the whole benefit of the provision. In *Evans v Atkins* (a), which was an action upon the same section of the statute, Lord Kenyon says, “the first section of the act prohibits officers from carrying persons arrested to prison within twenty-four hours; and the reason why they shall not be carried to prison sooner is, that they may have an opportunity of procuring bail, or agreeing with the persons at whose suits they are arrested. This therefore can only apply to those persons who are bailable.” Now a party who has conducted himself with violence and has attempted to escape from the officer, cannot be supposed to have any intention to set about obtaining bail, or agreeing with his creditor, and therefore is not a person contemplated by the act. In an anonymous case in 6 Modern (b), Lord Holt is reported

(a) 4 T. R. 556.

(b) 6 Mod. 96.

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to have said "that after arrest the bailiff ought to carry the party to the next gaol, if he do not desire to be carried to a place for to send for his friends;" from which it appears that Lord *Holt* considered that the party arrested should be the moving party, and not the party arresting.

DENMAN, C. J.—I think this rule ought to be discharged. It is clear upon the terms of the act of parliament that the bailiff, who is the only person near the party arrested, is bound to give him an opportunity of nominating a house to which he will go. If, without having done this, he has taken him to gaol within 24 hours, he has contravened the act. I have no hesitation whatever in coming to this determination upon the question. The learned judge who tried the cause thought at the trial that this was the correct interpretation of the act. In another case also, where it was differently ruled at *nisi prius*, the Court of Exchequer, upon the question being brought before them, overruled the decision of the learned judge in that case. There was, I think, also a clear contravention of the act, and a neglect of the duty of the bailiff, laid down in the third clause.

LITLEDALE, J.—I apprehend that it has been the invariable practice to take a person arrested to a lock-up house or gaol in the first instance. The act however only authorizes the officer to take a party immediately to the gaol upon a certain condition, which is, that he shall not *refuse* to be carried to some safe and convenient dwelling-house of his own nomination or appointment. Therefore there must be a *refusal*—there must be something more than a mere neglect by the party to nominate a place himself. There must be a refusal either to nominate, or having nominated, then he must have refused to allow himself to be carried there. That condition must have been complied with before the officer was authorized to carry the party to gaol. It is quite clear that a mere omission or neglect does not constitute a refusal.

PARKE, J.—When the objection was taken at the trial it appeared to me that a *refusal* was a condition precedent to the accruing of the power of the officer to take the person arrested to gaol within 24 hours from the arrest. It appears to me to be the true construction that a refusal must be where there has been a proposition made to the party to do the act. I do not think that there is any reasonable doubt upon the question.

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PATTESON, J.—I am entirely of the same opinion. I found my opinion upon the first section of the act, and particularly upon the meaning of the word '*refuse*.' I cannot conceive how a man can *refuse* to do an act which he has not been previously asked to do. Upon that short ground my decision in this case is founded. With regard to the third section, I think that it does not apply. It speaks only of particular circumstances. I repeat therefore, that I rest my opinion upon the short ground of the meaning of the word '*refuse*.'

Rule discharged.

The KING v. J. MANNERS SUTTON, Esq.

INDICTMENT, charging the non-repair of a bridge over the Trent, called Kelham Bridge, in the county of Nottingham, which the defendant was bound to repair *ratione tenuræ*. Plea, not guilty. At the trial of this indictment, at the Lincoln summer assizes, 1832, before Parke, J. certain rules of the Court, in the time of Charles 2, (to which it is not necessary more particularly to refer) were offered on the part of the prosecution, in order to shew that on an indictment relating to this bridge, judgment had been given against the ancestors of the defendant, possessors of the property in respect of which the liability of the defendant to repair is alleged to arise. The learned

After a verdict for the defendant upon an indictment for the non-repair of a highway, the Court refused an application for a new trial, on the ground of the improper rejection of evidence, but suspended the judgment in order that another indictment might be preferred.

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judge rejected this evidence, and a verdict was found for the defendant. In Michaelmas term last Sir *J. Scarlett* obtained a rule nisi for a new trial, upon the ground of the improper rejection of evidence and of misdirection; against which

Campbell, S. G., *Adams*, Serjt. and *Amos*, now shewed cause. After a verdict of not guilty in a criminal prosecution, the Court will not grant a new trial. In the case of *Rex v. Burbon* (a), an indictment was preferred for the non-repair of a highway, upon which there was a verdict of guilty. A motion was made for a new trial, upon the ground that the verdict was against all the evidence. Lord *Ellenborough* said, "In general the rule is not to grant a new trial in a criminal proceeding after a verdict of not guilty; and inasmuch as the right will not be bound on the plea of not guilty, we do not think it would be proper to break into the general rule on the suggestion that the prosecution was merely intended to determine a civil right." In *Rex v. Cotton* (b), which was an indictment for not repairing a highway, evidence was offered on the part of the prosecution, which *Dampier*, J. after hearing the argument on both sides, rejected; and in giving his judgment he adds, "This is a question of considerable importance, and of some novelty. I wish that my opinion upon it could be reviewed, but in the manner in which it arises that is impossible." *Rex v. Cohen* and *Jacob* (c) shews that in some cases of misdemeanor the Court will not grant a new trial on the ground of misdirection by the judge. In *Rex v. Russell* (d) a motion for a new trial was made in consequence of an agreement between the parties at the trial of the indictment. In the case of *Rex v. Mawbey and others* (e), some of the defendants were acquitted, and others found guilty, and the motion for a new trial in that case

(a) 5 M. & S. 392.

(b) 3 Campb. 444.

(c) 1 Stark. N. P. C. 516.

(d) 9 D. & R. 566; 6 B. & C.

566.

(e) 6 T. R. 619.

was made on behalf of those who were convicted. The only cases in which the Courts have interfered, have been cases partaking of a civil character, in actions for penalties, and informations in the nature of a *quo warranto*. In this case another indictment has been preferred against the defendant.

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Sir *J. Scarlett* (with whom were *Clarke*, *Balguy*, and *Waddington*) *contra*. The Court will grant a new trial upon an indictment for a misdemeanor in all cases except where the party has been acquitted upon the merits. There is no instance of a new trial being refused where the motion was grounded on the misdirection of the judge. All the cases distinctly confine the rule to the case of a verdict upon the merits, with the exception only of *Rex v. Burbon*. That was an indictment against a parish for not repairing a highway. The parish is of common right bound to repair roads; the verdict of acquittal therefore could not be given in evidence upon a second indictment. Lord *Ellenborough* puts the case upon that ground. In *Rex v. Mann* (a), Lord *Ellenborough* says, "The general rule is, that we do not grant a new trial upon an indictment for a misdemeanor, where a verdict has passed for the defendant upon the merits." In several other cases applications have been made to the Courts to set aside verdicts, on the ground that they were against the weight of evidence, in which the Courts have refused to grant a rule; *Rex v. Wandsworth* (b). In the case of penal actions, the Court, after great argument, decided that a new trial ought to be granted, upon the ground of the improper reception of evidence; *Wilson v. Rastall* (c). Lord *Kenyon* there said, "That whenever a mistake of the judge had crept in and swayed the opinion of the jury, he did not recollect a single case in which the Court had ever refused to grant a new trial." It is true that the case of an action for penalties is not technically the same as that now before the

(a) 4 M. & S. 337.

(b) 1 B. & Ald. 63.

(c) 4 T. R. 753.

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Court. An indictment for not repairing a highway, is, however, in the nature of a civil proceeding, though in form it is criminal. A penalty for the obstruction of a highway may be recovered either by plaint, action, or information. In none of the cases in which the Courts have refused a new trial, would the verdict have been evidence against the defendant in another indictment. In the cases of indictments against parishes for not repairing highways, the verdict could not have been evidence against them. Suppose that they had pleaded that *J. S.* was liable to repair *ratione tenuræ*, and the verdict had been against them, this would have been no evidence against them upon another indictment. So in an indictment on their prosecution against *J. S.*, a verdict against them would be no evidence in an indictment against another person. This case is distinguished from all the others, inasmuch as it is an indictment against an individual upon his prescriptive liability to repair. Where a defendant is acquitted through the improper rejection of evidence, this Court will grant a new trial (*a*).

DENMAN, C. J.—We are not disposed to grant a new trial in this case. We think that the judgment in this case may be suspended, and that another indictment may be preferred.

Judgment suspended (*b*).

(*a*) The question as to the admissibility of the particular evidence, was discussed on both sides, but as the Court did not express any

direct opinion upon that point, the arguments have not been given.

(*b*) And see Mann. N. P. Digest, *Nuisance*, pl. 28, 29, 31, 32.



1893.

In the matter of the Inquisition on the body of ROBERT
CULLEY, deceased.

ON the motion of *Campbell*, S. G., in this term, the following inquisition was removed into this Court by certiorari.

"An inquisition indented, taken for our sovereign lord the king, at &c., on &c., and by adjournment on &c., at &c., before *Thomas Stirling*, esq. one of the coroners of our said lord the king for the said county, on view of the body of *Robert Culley*, now here lying dead, on the oaths of S. R. S., &c., good and lawful men of the said county duly chosen, and who being now here duly sworn and charged to inquire for our said lord the king when, how, and by what means the said R. C. came to his death, do upon their oaths say, that on &c., at &c., a public meeting of a great number of persons then and there assembled together took place in consequence of a certain placard, "to adopt preparatory measures for holding a national convention:" And that the said R. C. being one of the constables of the metropolitan police, *in the execution of his duty*, was then and there present: And that a person to the jurors aforesaid unknown, in and upon the said R. C., *in the peace of God and of our said lord the king then and there being*, did then and there make an assault: And that the said person unknown, with a certain sharp instrument the said R. C. in and upon the left side of the body of him the said R. C., did then and there strike, stab, and penetrate: And that the said person unknown, by such striking, stabbing and penetrating the said R. C. as aforesaid, did then and there give unto the said R. C. in and upon the left side of the body of him the said R. C. one mortal wound of the breadth &c., and of the depth &c., of which mortal wound the said R. C. did then and there die. And the jurors aforesaid, upon their oaths aforesaid, do say, that we find a verdict of *justifiable homicide*, from no riot act or any proclamation ordering the people to disperse being read; and we consider that government did not take proper measures to prevent the meeting, and that the con-

The Court will, *ex officio*, quash a coroner's inquisition in which the facts of the case are stated, and the verdict found is not warranted by such facts.

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duct of the police was brutal, ferocious and unprovoked by the people; and we hope the government will take such steps in future as will prevent the occurrence of such disgraceful scenes. In witness whereof &c.”

Campbell, S. G., now applied to the Court to quash the inquisition. The jury have come to a wrong decision in point of law. An inquisition is evidence for various purposes, and being bad in law, ought not to be suffered to continue on record. In various instances inquisitions taken before coroners have been quashed by this Court^(a), who will not hesitate to do so where the inquisition is bad upon the face of it. Supposing, however, that there had been no instance in which the Court had so acted, yet this being the supreme Court of criminal justice, there can be no doubt but that it possesses the power. [*Denman*, C. J. I am not aware of any case in which the Court have quashed an inquisition, except where the application has been made by some person *interested*.] This application is on behalf of the crown. [*Denman*, C. J. Then I must ask, what is the interest of the crown?] There must be a writ of *melius inquirendo*, which it is apprehended the crown cannot issue unless this inquisition be first quashed^(b). When indeed the inquisition is

(a) Where a verdict of murder or manslaughter has been found by a coroner's inquest, and the party is indicted at the assizes and acquitted upon the indictment, he is liable to be tried again upon the inquest. The finding of the coroner's jury is in general so defectively drawn up, that the inquest is usually quashed by the Court of oyer and terminer, upon the application of the party charged. And see *Rex v. Aldenham*, 2 Lev. 152; *Regina v. Clerk*, 1 Salk. 377, and 7 Mod. 16; Anon. 12 Mod. 112; *Rex v. Evett*, 9 D. & R. 237, and 6 B. & C. 247; *Rex v. High Constable &c. of the Tower of London*, Ex parte *Caruthers's* assignees,

Jervis, Office of Coroner, 408; *Ib.* 21, 285.

The quashing of a coroner's inquest for defects apparent on the face of it, has become so much a matter of course, that it seems to be highly desirable either that a person charged with murder or other felonious homicide should be exempted from a second trial after an acquittal upon a solemn investigation before a judge and jury, or that, if such second trial be required, some means should be provided for making the coroner's inquest available.

(b) Com. Dig. *Officer* (G. 12.); Mann. Exch. Pract. 2d edit. 22.

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merely void (a), it may of course be treated as a nullity. Here there is no doubt whatever, upon the facts stated in the inquisition, the offence amounted to murder. It is stated that *Culley* being one of the constables of the metropolitan police, in the execution of his duty was present, and that he was in the peace of God and of our said lord the king. [*Littledale, J.* It does not, upon the face of the inquisition, appear to be murder, because it merely says that the person unknown made an assault upon and inflicted a wound, of which he died.] They state the facts upon which they ground their conclusion, that the offence was justifiable homicide. [*Denman, C. J.* There is not a word about *Culley's* conduct. I doubt whether it is any finding at all.] All that is said about *Culley* is, that he was in the discharge of his duty, and in the peace of God and the king. [*Parke, J.* It is quite impossible that upon the facts and grounds stated, the act could be justifiable, or even excusable homicide.] This application is for a rule nisi to quash the inquisition. [*Denman, C. J.* Upon whom can you serve it? There is no one interested but the crown.] Then perhaps the Court will quash it in the first instance. [*Parke, J.* There is a case in *Strange* (c) in which an inquisition super corpus was quashed, and it does not appear that there was any rule nisi.]

DENMAN, C. J.—It appeared to us that it would be rather strong to give our opinion upon the legality of this inquisition, without having some one before us *who was interested in it*; but it having been brought before us by certiorari, and appearing clearly bad, it would be our duty to quash it: indeed I think it is no finding at all. The

(a) Vide Serjt. *Jenney's* case, M. 2 R. 3, fo. 2, pl. 5.

(b) In *Anon.* 1 Stra. 533, it is merely stated that a rule was granted to take up a body in order for a new inquisition, the former *having been quashed*. And see *The Welshmen's* case, Popham, 209; *Rex et Reg. v. Bunney*, 1 Salk. 190; Carth. 72; *Rex v. Saunders*, 1 Stra. 167.

As to the proceedings in K. B., where the body cannot be found, or ought not to be dug up, see *Stanlack's* case, 1 Ventr. 181; *Anon.* ibid. 352;—in courts of oyer and terminer, i. e. at the assizes, *Rex v. Parker*, 2 Lev. 140; *Newman's* case, 2 Roll. Abr. 96, pl. 3;—before justices at quarter sessions, ib.; *Anon.* 1 Roll. Rep. 217; *Anon.* Poph. 209.

premises in question, according to the custom of the manor, made a voluntary surrender of them out of Court, to the use of *George Rylah* and *Thomas Tunstill*, (the lessor of the plaintiff,) in trust for *Leng* for life, and after his decease in trust for his children and grand-children.

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23 December 1811. *Leng*, in consideration of the sum of 300*l.* paid to him by *Tunstill*, which was a fair price for the premises, again surrendered them out of Court to the use of *Tunstill* for life, and after his decease to the use of such person or persons as he should by will direct or appoint; and in default thereof to the use of the right heirs of *Tunstill*.

8 January, 1812. Both these surrenders were presented at the same Court, when *Rylah* and *Tunstill* were admitted on the former, and *Tunstill* on the latter surrender. The presentment of the surrender to *Rylah* and *Tunstill*, and their admission thereon, are entered on the court rolls, before the presentment of the surrender to *Tunstill* and his admission thereon.

1812. *Tunstill* entered, and continued in possession within 20 years before action brought.

25 March, 1813. *Tunstill* contracted to sell the property to *John Botterill* for a full valuable consideration, out of which it was agreed that a debt of 200*l.* then owing by *Tunstill* to *John Botterill* should be retained. Before the last-mentioned contract was finally completed, *Tunstill* became bankrupt, and a commission of bankrupt was issued against him, under which assignees were duly chosen.

24 January, 1815. The assignees of *Tunstill* were admitted tenants.

16 January, 1818. The surviving assignee of *Tunstill*, in consideration of the residue of the purchase money expressed in the contract of the 25th March, 1813, over and above the said sum of 200*l.* due and owing by *Tunstill*, surrendered to the use of *John Botterill*.

14 September, 1819. *John Botterill* was admitted tenant.

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1827. *John Botterill* died intestate, leaving the defendant his customary heir.

Leng and *Rylah* died before the day of the demise,

Knowles for the plaintiff. Two points are raised for the consideration of the Court; the first being the general question whether copyholds are within the statute against fraudulent conveyances, 27 *Elizabeth*, c. 4; and the second, whether, supposing the statute to apply, the second surrender to and admittance of *Tunstill*, constitute such a conveyance as will give rise to the operation of the statute. The case finds that the first surrender was for a voluntary consideration, namely, for natural love and affection; and though it is now too late after the case of *Doe v. Manning* (a), to contend that a voluntary is not a fraudulent conveyance, yet the reluctance with which the Court came to that conclusion, will operate as an argument for not extending the doctrine of that case to any which is not precisely similar. In the present case there is this peculiarity, which probably never occurred before; that the voluntary conveyance and the conveyance for a valuable consideration have both been made to one and the same person—a state of things not contemplated by the statute; for the words “of intent and purpose to deceive such persons as shall afterwards purchase,” cannot apply where the party to whom the voluntary conveyance is made, and the party in relation to whom the intention to deceive is supposed to exist, are one and the same person. The supposition of law is, that at the time the voluntary conveyance is made, there exists an intention to deceive the party afterwards purchasing; of necessity, therefore, the parties must be different. Besides this, copyholds are not within the statute against fraudulent conveyances. They have never been expressly determined to be so. It is true that in *Doe v. Routledge* (b), Lord Mansfield seemed to think that copyholds were within the statute; but that opinion was expressed without previous considera-

(a) 9 East, 59.

(b) Cowp. 705.

tion, and the case itself was decided upon a collateral and wholly distinct point, viz. the inadequacy of the consideration. On the other hand, there is a decision of *Blencowe, J.*, only to be found in *Buller's Nisi Prius* (a), in which it is expressly declared that copyholds are not within the statute. There is therefore no decisive authority; and considering the question as *res integra*, it is open to the plaintiff to contend that the general words of the statute "lands, tenements, and hereditaments," do not apply to copyholds. In *Rose v. Bartlett* (b), the authority of which has never been doubted, it was held, that by a general devise of testator's lands and tenements, the testator leaving both freehold and leasehold, the leasehold did not pass. So before 55 Geo. 3, c. 172, a general devise of real estate, as *e. g.* a devise of testator's lands and tenements, as in *Rose v. Bartlett*, or a devise of "lands, tenements, and hereditaments," the words used in the statute of *Elizabeth* would not pass copyholds, unless the testator had indicated an intention of passing them by surrendering them to the use of his will. It may be said that in relation to statutes a different rule of interpretation exists, and that copyholds are included in many acts of parliament by general words. But there are many statutes in which copyholds are not included. They are not within the statute *de donis*, 13 Edw. 1, c. 1 (c), or the 13 Edw. 1, c. 18, which gives the *elegit* (d), or the 11 Hen. 7, c. 20, which restrains the husband from alienating the wife's lands (e); and (to pass over many (f) others,) they are not within 13 Eliz. c. 5, which is nearly word for word with the statute now under consideration, and passed with nearly the same object; that, having the protection of creditors in view, and this, the protection of purchasers (g). The defendant will rely on *Heydon's* case (h). The question in that case was, whether copyholds

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(a) Page 105.

(b) Cro. Car. 292.

(c) Co. Copyh. 123, 213.

(d) Ibid. 123, 215; Cro. Car. 44.

(e) 2 Siderf. 40, 73.

(f) Co. Copyh. 120, 212.

(g) 1 Cox, 278.

(h) 3 Co. Rep. 7.

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were within the 31 *Hen. 8*, c. 13, which avoids certain leases made by religious houses. But the doubt there was, not as to the comprehensiveness of general words, but whether a copyhold estate, being holden at the will of the lord, could be called an estate and interest for life. Some general rules are certainly laid down in that case for distinguishing what statute applies to copyholds, and the principal rule is to consider whether the tenure of the land will be altered, and whether the interest of the lord will be affected by holding the statute to apply. But it is clear that the alteration of tenure or the interest of the lord have not always been the ground of decision; since in many of the statutes which have been held not to apply to copyholds, it is difficult to imagine how the interest of the lord would have been affected or the tenure altered by a contrary decision. The true reasons why copyholds were held not to be included in the earlier statutes seems to have been the baseness and insignificance of the estate. Besides, adopting one of the rules in *Heydon's* case, it may be said that copyholds are not within the mischief against which the statute was meant to provide. The mischief contemplated was secret conveyances. But the purchaser of a copyhold does not need the protection of the statute. The title to a copyhold appears on the court rolls, and if the purchaser takes a conveyance from him who has the legal estate, and also from those who on the face of the court rolls are stated to have the beneficial interest, he is as safe as the statute of *Eliz.* could make him. Copyholds, therefore, if within the words of the statute, are not within the mischief, and according to Lord *Coke*, must be considered as not within the purview of the act. So, a case out of the mischief intended to be remedied, shall be considered as not within the purview, though it be within the words of the statute (a). The act of *Elizabeth* is highly penal. The third section treats as criminal all parties who shall put in use

(a) *Mathews v. Feather*, 1 Cox's Rep. 278.

fraudulent conveyances, and subjects them to fine and imprisonment. The Court will not put a construction on the act that shall go to enlarge the application of a penalty. This act creates an offence unknown to the common law, and ought to be governed by those rules of interpretation that govern criminal statutes, and which restrict the operation of the statute to cases expressly designated therein. Copyholds, therefore, are not within the statute of *Elizabeth*.

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(The Court, at the outset, intimating a strong opinion against the plaintiff on the second point, *Knowles* declined insisting upon it.)

Cresswell, contra. With the exception of the passage in *Buller's Nisi Prius*, there is no authority to shew that copyholds are not within this statute of *Elizabeth*. The words of the statute are sufficiently large to comprehend copyholds, and there is no reason why they should be exempted from its operation. The case of *Mathews v. Feather (a)*, is an authority for the defendant, because there the creditors succeeded in obtaining a direction to the Master to inquire into the nature of the interest of the assignor in the copyhold premises which formed part of the property alleged to have been fraudulently assigned. The opinion of Lord Mansfield, in *Doe v. Routledge*, was expressed after much consideration.

Cresswell was here stopped by the Court.

DENMAN, C. J.—The words of the statute of 27 *Elizabeth* c. 4, appear to me quite sufficient to include copyholds. In *Doe v. Routledge*, Lord Mansfield expressed a deliberate opinion that this statute did extend to copyhold estates, and there is no case the other way except that mentioned in *Buller's Nisi Prius*, which is a mere dictum.

LITTLEDALE, J.—In *Comyn's Digest (b)*, the general rule is laid down, that copyholds are included within the

(a) 1 Cox's Rep. 278.

(b) Copyhold, (N).

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general words of a statute, if no prejudice will thereby ensue to the lord. No prejudice would ensue to the lord in this case. I have therefore no doubt this statute of *Eliz.* affects copyhold estates.

PARKE, J.—I entertain no doubt on this case. It appears to me that this act affects copyhold lands. It is laid down in *Heydon's* case (*a*), that the general words of acts of parliament extend to copyhold or customary estates, except where the tenure of the land would thereby be altered or the lord prejudiced. This statute does not change the nature of the tenure, nor does it injure the rights of the lord. Copyholds are therefore within its operation. With respect to the second point, it was settled by the case of *Doe v. Manning* (*b*), that even where the purchaser has notice of the prior voluntary settlement, yet such settlement is rendered void by the 27 *Eliz.*

PATTESON, J.—I am of the same opinion. The words of the statute are confessedly large enough to include copyholds; and the question is, what reason is there whereby they should be excluded. In *Watkins* on Copyholds (*c*), there is a considerable dissertation as to how far statutes ought to be applied to copyholds, and the opinion of Lord Coke, which has been mentioned, is followed. This case does not fall within the exception to that rule; the postea must therefore be delivered to the defendant.

Postea to the defendant (*d*).

(*a*) 3 Co. Rep. 7.

(*b*) 9 East, 59.

(*c*) 2 Walk. Copyh. 1st ed. 186; 2d ed. 196. The case of *Mathews v. Fever* had not however been published when *Watkins* wrote.

(*d*) And see *Rowden v. Malster*, Cro. Car. 42.

In *Mathews v. Fever*, cited ante, 67, which was the case of an annuity creditor seeking to set

aside an assignment of leasehold and copyhold property by the debtor to his son, Sir Lloyd Kenyon, M. R. was of opinion that copyholds not being generally subject to debts, an assignment of them could never, except under special circumstances, be fraudulent against creditors, under 13 *Eliz.* cap. 5.

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## OUGHTON v. TROTTER.

**ASSUMPSIT** for goods sold and delivered. Plea, general issue, with notice of set-off. At the trial at the Middlesex sittings after Michaelmas term, 1832, before *Denman, C. J.*, the following facts appeared:

The defendant was indebted to the plaintiff for work done to the amount of 52*l.* 11*s.*, and the plaintiff was indebted to the defendant 25*l.* 10*s.* 11*d.* for work done. On the 7th of April, 1831, the defendant called a meeting of his creditors, which the plaintiff attended. At this meeting resolutions were entered into and signed by the creditors present, to accept six shillings in the pound. The following is a copy of the resolutions:

"At a meeting of the creditors of *Edward Trotter*, held this 7th day of April, 1831:

"Resolved, that the offer of six shillings in the pound, as a composition, be accepted by the undersigned, and that therefore the necessity for an assignment to trustees be superseded; such composition to be made in two payments, by the joint and several promissory notes of *W. W. Cox* and *E. Trotter*. A release to be executed to *E. Trotter*, with the usual proviso, that if the instalments are not punctually paid, the release shall be void. *The notes to be given within fourteen days, the creditors assenting thereto within that time.*"

(Signed by the plaintiff and others.)

Nothing further was done in the matter until the 31st of the following May. On that day the plaintiff was applied to to execute a release to the defendant, which he refused to do. On the 25th of July, the plaintiff received the following letter from the defendant's attorney:

"Sir,—Having called on you for the purpose of paying you 4*l.* 0*s.* 11*d.*, the amount of the promissory note given by Mr. Trotter, and which is due this day, and not finding you at home, I beg leave to say that the amount is now lying at my office for you, together with the other promis-

Where, at a meeting of creditors of *A.* it is agreed that a composition of 6*s.* in the pound shall be accepted, and that promissory notes for the amount "shall be given within fourteen days, the creditors assenting thereto within that time," and *A.* is sued for a debt due to one of the parties to the agreement, unless *A.* can shew delivery or tender of the note, he is liable for the whole debt.

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sory note, due three months hence, and which will be handed to you on your signing the deed, as agreed upon by you and the other creditors of Mr. Trotter."

It was objected on the part of the defendant, at the trial, that as the plaintiff had agreed to take a composition for his debt, he could not maintain the action. The Chief Justice directed the jury to find a verdict for the defendant, and gave the plaintiff leave to move to enter a verdict either for the whole of his demand, or for such sum as six shillings in the pound, upon the original demand, would amount to. A verdict was accordingly found for the defendant. A rule nisi having been obtained,

Sir J. Scarlett now shewed cause. By the resolution the notes were to be given by the defendant in fourteen days, if the creditors assented within that period. The plaintiff did not assent within the fourteen days, the defendant might therefore give the notes within a reasonable time afterwards. It is a maxim of law, that where no time is fixed for the performance of a contract, it is to be performed within a reasonable time. Each creditor could not be bound to take the notes before the others assented, and they were not bound to assent before the lapse of fourteen days. The notes were never demanded; and it appeared that they were dated on the 22d of April.

*Erle*, in support of the rule. The meaning of the argument was, that the release should be void, either if the notes were not delivered in fourteen days, or if the notes were not honoured when due. The notes were dated on the 22d of April, but it does not appear that they were then signed, at all events they were not delivered until the middle of May. It was the business of the defendant to tender the notes to the plaintiff; *Cranley v. Hillary (a)*. In that case Lord *Ellenborough* says, "The rule is, that the person to be discharged is bound to do the act which is to dis-

(a) 2 M. & S. 120; and see *Shipton v. Casson*, 8 Dowl. & Ry. 130; 5 Barn. & Cres. 378.

charge him, and not the other party." *Dampier, J.*, in the same case, says, "It is laid down by *Littleton*, that the obligor of a bond conditioned for the payment of money at a particular day, is bound to seek the obligee if he be in England, and at the set day to tender him the money, otherwise he shall forfeit the bond. So in this case, the defendant was to give the notes, and therefore to go with them to the plaintiff, and he was not to go to the defendant." At the time when the notes were given, the plaintiff was remitted to his original right, and therefore might refuse to accept the notes. If it had been intended that the notes should be given within a reasonable time, the parties would either not have stipulated about time at all, or they would have expressly said that the notes should be given within a reasonable time. An agreement which specifies the time of performance, should not be construed as if no time was fixed. An agreement to take a composition is no extinguishment of the original debt; *Thomas v. Courtnay*(a). The plaintiff is at all events entitled to the composition; *Heathcote v. Crookshanks*(b).

**DENMAN, C. J.**—The plaintiff has his right of action entire, and is entitled to recover the whole demand.

**LITLEDAL, J.**—In common cases of agreements to take compositions, the debtor has a reasonable time to give the notes. In this case it was stipulated that they should be given within fourteen days. Supposing these facts had been specially pleaded, the defendant must have averred the payment of the notes within the fourteen days. In some acts of parliament the specification of time is only directory; here it is matter of special agreement. The creditors do not assent, and the notes are not given within fourteen days; the whole agreement is void.

(a) 1 Barn. & Alders. 1.

(b) 2 T. R. 24.

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**PARKE, J.**—The agreement was, that all the creditors should be put in the same situation. It was therefore requisite that some reasonable time should be stipulated for, that all the creditors might assent. Here, the time has been specified. I think that the whole agreement was void if the creditors did not assent within fourteen days. But supposing I am wrong in this, those who do assent at all events should receive their notes within fourteen days, and if they do not, they are remitted to their original right of action.

**PATTESON, J.**—The assent of the creditors was a condition precedent, as it seems to me, and the notes should be given within fourteen days. The case of *Cranley v. Hillary* shews that they should be tendered by the debtor, and need not be asked for by the creditor.

Rule absolute to enter the verdict  
for the whole demand of 27*l*.

**HUMPHRIES v. The Inhabitants of the City of BRISTOL,  
and County of the same City.**

By an act of parliament a district is taken out of the county at large, and annexed to the county of a city, and is declared to be member and parcel of the county of the city, except for certain purposes. If a house situate in the annexed district be feloniously demolished by rioters, the owner may sue the inhabitants of the county of the city for the amount of his damages, under 7 & 8 *Geo. 4*, c. 31, if such liability is not mentioned among the exceptions, although it may not clearly appear that the defendants could reimburse themselves by a rate which should embrace the annexed district.

**THIS** was an action of trespass on the case, to recover compensation for the demolition of furniture, &c. in a house in Bedminster, during the Bristol riots in 1831. At the trial before *Patteson, J.* at the Bristol summer assizes, 1832, a verdict was found for the plaintiff, damages 900*l.*, subject to the opinion of the Court upon the following case:—


On the 30th October, 1831, and within three calendar months before the commencement of this suit, a large number of persons, consisting of 1000 persons and upwards,

the owner may sue the inhabitants of the county of the city for the amount of his damages, under 7 & 8 *Geo. 4*, c. 31, if such liability is not mentioned among the exceptions, although it may not clearly appear that the defendants could reimburse themselves by a rate which should embrace the annexed district.

being riotously assembled together, to the disturbance of the public peace at Bedminster, within such district and on part of such land and property as by 43 Geo. 3, cap. cxl. (a) intituled "An Act for improving and rendering more commodious the Port and Harbour of Bristol," was exempted and separated from the counties of Somerset and Gloucester, and made parcel of the city of Bristol and county of the same city, as hereinafter is more particularly set forth, feloniously destroyed a certain house there situate, and at the same time unlawfully damaged and destroyed the fixtures, furniture, and goods of the plaintiff, of the value of 900*l.*, then being in the said house, and to the damage of the plaintiff of 900*l.* and against the form of the statute in such case made and provided.

All the requisitions of the statute, and of the law, were duly complied with by or on the part of the plaintiff.

By sect. 65 of 43 Geo. 3, cap. cxl. it was enacted, that from thenceforth a certain district and certain land (therein particularly described) should be to all intents and purposes (except as thereafter mentioned) wholly exempted and separated from the counties of Somerset and Gloucester, and from all jurisdiction, power and authority of sheriffs, (except as far as respected the purchase money and compensation for injuries under the powers of that act, and which were to be settled by a jury or juries of the county or city wherein such lands lay before the passing of that act, except as thereafter is mentioned,) escheators, coroners, justices, and other officers and ministers of the king whatsoever, of the said counties of Somerset and Gloucester respectively, for ever, and should be taken as member, part and parcel of the city of Bristol and county of the same city, and of the port of Bristol, and within the jurisdiction, power and authority of the mayor, burgesses and commonalty of the said city, and of the mayor, sheriffs, (except as aforesaid,) coroners, escheators, justices, and

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(a) Local and personal; to be judicially noticed.

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others the officers and ministers of the king, of the said city &c. for ever, as fully and amply as if the same had been made part and parcel of the said city &c. before and at the time of granting the several charters, under which, the mayor, burgesses and commonalty of the said city of Bristol did then hold and exercise criminal and civil jurisdiction within the said city and county of the same city, and the suburbs, liberties and precincts thereof, or have rights and franchises in any manner whatsoever, within the same, or as if the several powers and authorities, rights and franchises by such charters or otherwise given were therein repealed and applied to the several districts thereby united to and made part of the said city of Bristol &c.; and the provisions relative to courts of conscience in Bristol, made by an act of 1 *Will. & Mary*, were by that act extended to the said several districts so as aforesaid united to and made part of the city of Bristol &c. and exempted and separated from the counties of Somerset and Gloucester respectively. And it was thereby provided and enacted (sect. 66), that nothing therein contained should extend to make any alteration within the districts so exempted and separated from &c. and added to &c., touching any tax, rate, levy, or assessment usually raised within the said city of Bristol &c. touching any matter relative to any ecclesiastical, parochial or material jurisdiction or right, or to the taking away the right of freeholders within the district aforesaid to vote for the election of any knight of the shire, coroner, or other officer whatsoever for Somerset and Gloucester respectively, or to the conferring a right to any freeholder, within the said districts, of voting at the elections of citizens for the city and county of Bristol, but that all the same rights, matters and things should be and remain as if that act had not been made. And it was further provided and enacted, (sect. 67) that the said parts of the said respective counties, of Somerset and Gloucester should, *as to all matters and things not thereinbefore excepted and specified, be and be deemed and construed to be, to all intents and purposes what-*

*ever, part and parcel of the said city and county of the city of Bristol, and within the same.*

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By 56 Geo. 3, cap. lix. (under the provisions of which the present gaol of the city and county was built on a piece of land, which by 43 Geo. 3, cap. cxi. had been separated from the county of Somerset and made part of Bristol,) it was enacted that the commissioners thereby appointed should yearly ascertain and determine what sum or sums of money they should judge necessary to be assessed and raised for the purposes of that act in the city and county of Bristol, for the year then next following, and should certify the same, by their clerk, to the justices of the peace for the said city and county at the general quarter sessions to be holden in and for the said city and county, in every year; and the said justices were thereby empowered to order and appoint such sum or sums of money to be raised and levied by taxation of all lands, houses, &c. within the said city and county (except places of worship) in equal proportions, according to their value; and in order thereto, the said commissioners were thereby authorized and required, after the said certificate and the order of appointment made thereupon by the justices of the said city and county in sessions, indifferently to proportion out the said sum or sums of money upon each parish and precinct within the said city and county, in the like manner and proportion in each such parish and precinct, as the money then raised or thereafter to be raised for the maintenance of the poor of the said city and county was apportioned, and by warrant under their hands and seals to authorize the person thereby appointed collector of the rates and assessments, to rate, assess, demand and collect and receive the same respectively. Proviso and enactment, exempting from liability to such rates and assessments, all lands, tenements and hereditaments, situate and being in the several districts separated and exempted from the counties of Somerset and Gloucester, and added to the city and county of Bristol by 43 Geo. 3.

The plaintiff was duly appointed, and was the gaoler or governor of the said gaol, before and at the time of the



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destruction and demolition of the said house, fixtures, furniture and goods so demolished and destroyed as aforesaid, and which said house was situate within the walls of the said prison, and was the property of the corporation of Bristol, and the residence of the plaintiff as such gaoler as aforesaid.

No general county rate has ever yet been raised in the city and county of Bristol.


The district separated from the county of Somerset and made part of the city &c. as aforesaid, by 43 *Geo. 3*, c. cxi., has not been at any time rated or assessed to any parochial rates or taxes charged upon the city and county of Bristol, or any of the wards or parishes within the same, but has been constantly rated and charged to all parochial rates and taxes as part and parcel of the hundred and parish of Bedminster, in the county of Somerset, except as to the said piece of land purchased for the purposes of the new gaol, and on part of which land the house so demolished as aforesaid was situate, and for which land, and the said gaol and house and buildings thereon, no rates have been demanded or paid since it was so purchased.

The separated district contains a numerous population and a large amount of ratable property, consisting of lands and of dwelling-houses and other buildings, and in respect of its poor and poor-rates has been and is managed by the churchwardens and overseers of Bedminster and by the magistrates of the county of Somerset.

By statute of 3 *Geo. 4*, c. xxiv. it is enacted, that the corporation of the governor, deputy governor, assistants and guardians of the poor of the city of Bristol, shall, in manner therein mentioned, ascertain what sum of money will be requisite for the maintenance of the poor of the said city and county for the then current year, and certify the amount to the justices, who are thereby required to order such sum to be raised for the purposes aforesaid as they shall think proper, not exceeding the sum so ascertained and certified, and that as soon after the said order of ses-

sions shall have been made and transmitted as conveniently may be, the mayor of Bristol, and any two of the justices of the same city, or any five justices without the mayor, shall cause all such sums as shall be so ordered to be raised by such order of sessions, (together with such other sums as therein mentioned) to be raised and levied by taxation of every inhabitant, and of all houses, lands, tithes, and other ratable property in the city and county of Bristol, in equal proportions, according to their value; and in order thereto indifferently to apportion the said sums of money respectively upon each parish and precinct within the said city and county. The act of 3 *Geo.* 4, c. xxiv. repeals 7 & 8 *Will.* 3, c. 32, by which the corporation of the governor &c. of the poor of the city of Bristol was originally constituted; and re-enacts in substance, by the enactment above stated, a similar provision in the former act.

By 2 *Will.* 4, c. lxxviii., it is enacted, that for raising money for the purposes of that act, the governor &c. of the poor of the city of Bristol shall, by writing under their common seal, certify to the justices of the peace for the said city and county, at their general quarter sessions to be holden in July 1832, or at some adjournment thereof, that it will be necessary to raise for the purposes of that act, for the year commencing on the 25th March then last past, 10,000*l.*, and that the said governor &c. shall in the year 1833, and thenceforward in every year, so long as any sum exceeding 10,000*l.* shall be required for the purposes of that act, by their annual certificate of the sum requisite for the maintenance of the poor of the said city and county, to be made by virtue of the said act of 3 *Geo.* 4, certify to the justices that the sum of 10,000*l.*, or such further sum as thereafter mentioned, will be required for the purposes of that act; and that the said justices, at the said quarter sessions to be holden in July 1832, shall order the said sum of 10,000*l.* to be levied for the purposes of that act, for the year commencing 25th March, 1832; and so in every subsequent year so long as any such sum shall be required for the

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purposes of that act. And it is thereby further enacted, that as soon after such order of sessions as conveniently may be, the said governor &c. shall either cause the said sum of 10,000*l.* to be added to any assessment which shall have been made for the purposes of the said recited act, in which case the same shall be assessed upon the several inhabitants, owners, and occupiers of all lands, houses, tithes, and other ratable property within the several parishes in the said city and county, in the same proportions as the sum already certified and assessed, and shall be added to and collected with the same; or if no such assessment shall have been then made, shall add the same to the sum already certified as aforesaid, so that the same may form one aggregate sum therewith.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover for the damage and destruction to furniture, fixtures, and goods, being at the time of such damage and destruction in a house situate as aforesaid.

*Campbell*, S. G. for the plaintiff. Upon the general act of 7 and 8 *Geo.* 4, c. 31, the plaintiff is entitled to recover compensation for the damage which he has sustained. By section 2 of that act, the hundred is made liable to yield compensation for fixtures, furniture, and goods in a house &c. within the hundred, demolished wholly or in part by persons riotously assembled; and by the 12th section it is provided that the inhabitants of counties of cities and towns, where any of the offences mentioned in that act are committed within a county of a city or town, shall be liable to yield compensation in the same manner as the inhabitants of a hundred. The Bristol gaol was built upon land within a district, which has been made to all intents and purposes (with certain exceptions) part and parcel of the city of Bristol and county of the same city, and within the same; and this case does not fall within any of the exceptions specified in the act. It is admitted that this is a *house*

within the act, and if this be within the meaning of the act, an offence committed in the county of the city of Bristol, it is the inhabitants of the city of Bristol, and not of the hundred of Bedminster, who will be bound either to restore or to make compensation. But for the exceptions, the matter would have been quite clear; so that the only question will be whether this case falls within the exceptions. These exceptions are, of matters, 1st "touching any tax, rate, levy, or assessment usually raised within the said city of Bristol and county of the same city:" 2d, "touching any matter relative to any ecclesiastical, parochial, or manerial jurisdiction or right:" and 3d, "to the rights of freeholders to vote at elections for knights of the shire of Somerset and Gloucester, and for citizens of Bristol respectively." This case does not fall within any one of the exceptions. The 67th section is unnecessarily added, but shews the anxiety of the legislature to make it clear that for all other purposes but those expressly excepted, this district should be taken to be part of the city and county of Bristol. In the Bristol gaol act, (56 Geo. 3,) there is a recital that the old gaol was small and inconvenient, and that it would be of great public utility if a new gaol were to be erected in some other part of *the city and county of Bristol*; and then it is provided (section 16) that the commissioners appointed by that act may purchase the land mentioned in the first schedule, for the purpose of erecting a new gaol; and the land mentioned in the schedule and upon which the gaol was in fact built, is described as "one piece or parcel of ground situate, lying, and being in that part of the parish of Bedminster which lies in the city of Bristol, the property of &c." By section 37 it is declared that such new gaol shall be the common gaol of the city and county of Bristol, and that the sheriffs of the said city and county shall have the keeping of it. By section 40, the commissioners are empowered to levy, for funds for building the gaol, a pound rate upon lands &c. within the city and county of Bristol; and by the 42d section, which will be relied on for the

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defendants, the lands &c. within the district separated from Somerset and Gloucester, and added to Bristol, are exempted from being rated or assessed for any part of the sums to be raised for the purposes of that act. This however supplies an argument in favour of the plaintiff, for it appears from it, that but for this enactment the provisions of section 40 would have extended to this district, and there is no reason why a place may not be exempted from a particular rate, and yet be a part of the city and county of Bristol.

*Follett*, for the defendants. It is contended that the provisions of the 2d section of 7 & 8 Geo. 4, c. 31, are extended by the 12th section to counties of cities of towns. It is necessary to look particularly at this act. The recital in the 12th section says, that it is expedient to provide for the case of counties of cities and towns, &c. which do not contribute to the county rate, or do not contribute as part of a hundred; and then enacts, that where any such offence shall be committed in a county of a city or town, &c. the inhabitants thereof shall be liable to yield compensation in the same manner as the inhabitants of the hundred. The 14th section provides the mode of reimbursement, under the act, in liberties, cities and towns not within any hundred, but contributing to the county rate: and as to the mode of payment and reimbursement under the act, in counties of cities, &c. which do not contribute to the payment of the general county rate, the 15th section enacts, that all sums of money payable by virtue of the warrant of the sheriff or other officer, or of any orders arising out of any action or summary claim against the inhabitants of any county of a city, &c. shall be paid out of the rate (if any), in the nature of a county rate, or out of any fund applicable to similar purposes, where there is such a rate or fund therein, and where none, out of the rate or fund for the relief of the poor of the particular parish, township, district or precinct therein, where the offence was committed, by the overseers or other officers having the collection and

disbursement of such rate. After having stated these provisions of the act of 7 & 8 *Geo.* 4, it becomes material to observe how the city of Bristol is situated with respect to county and parochial rates. There has never been any general county rate for the county of the city of Bristol, and there has never been any assessment for the relief of the poor made upon the separated district by any of the authorities of Bristol, it being stated upon the case that it has always been assessed towards the maintenance of the poor of the parish of Bedminster. How then is payment and reimbursement under the act to be made? The 66th section of 40 *Geo.* 3, exempts the added district from "any tax, rate, levy, or assessment usually raised" within the city and county of Bristol; and a question arises upon this, whether the county rate is to be considered as a rate usually levied. It was not intended to annex this district for the purpose of bearing any portion of the city burthens and to relieve its inhabitants from their former burthens, but merely to give jurisdiction to the magistrates of the city of Bristol, and to exempt the district from the jurisdiction of the sheriffs of the counties of Somerset and Gloucester. The preceding clause shews that this alone was the object of the annexation.

The clause which has been alluded to respecting the building of the new gaol does not affect the argument on either side; for it is admitted that for some purposes the district in which the new gaol is situated is within the city of Bristol. In that act however it is to be observed that the same care is taken to exempt the parts of Bedminster from the rates to be made in respect of the building of the gaol. With regard to the late act, that extends only to those places which were liable to the poor-rates, which is not the case with Bedminster.

It is therefore contended that the district is not so locally situated that the inhabitants of the district where the offence is committed can recover against the inhabitants of the old part the amount of the compensation, and that the more

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so, because no part can be levied upon the district by the inhabitants of Bristol. There are not sufficient facts stated in the case to enable the court to say whether an action would lie against the inhabitants of Bedminster, and it is not necessary to the argument for the defendants to shew that it will lie against them.

*Campbell, S. G.* in reply. The only point which has been made is, that Bedminster is not liable to the Bristol county or parochial rates. This has not been established; and if it had been so, would not have affected the question. The act clearly and distinctly says, that the districts separated from Somerset and Gloucester shall be, to all intents and purposes, a part of the city and county of Bristol and within the same, except as is in that act excepted; and this has not been brought within any of the exceptions. The exception is only of such local rates as are therein mentioned. But, supposing that it meant all rates whatever usually levied, it is found that up to that time the county rate never had been raised. It meant all rates which up to that time had been accustomed to be levied, and not all the rates which they by possibility could or were by law empowered to raise; and therefore it does not appear that they were exempted from the county rate. If, however, they were so, this would not be material; for it is sufficient if this be a part of the city and county of Bristol.

DENMAN, C. J.—A very ingenious argument has been used, on the part of the defendants, shewing the difficulty which there may be in obtaining reimbursement, should the Court hold that the inhabitants of Bristol are in the first place liable to make compensation to the plaintiff. It appears to me however that there is no doubt whatever that the inhabitants are, within the plain terms of the act of parliament, liable; for it is quite clear that the districts are made part of the city and county of Bristol. The only question upon this point is, whether this case falls within any of the exceptions. I think we may fairly say that the

county rate, never having been levied, it cannot come within the description of a rate *usually* raised. It appears to me therefore that the verdict must be entered for the plaintiff.

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LITLEDAL, J.—The question is, whether the house is part of the city of Bristol, so as to render the inhabitants liable. It appears to me that it is. It is said that the district is annexed only for the purposes of jurisdiction. This, I think, is not so. The 65th section of the act says, that the districts separated from Somerset and Gloucester shall be taken as “member, part and parcel of the city of Bristol and county of the same city, and of the port of Bristol, *and* within the jurisdiction, power and authority of the mayor &c. of Bristol.” So that according to the act this district is not only placed within the *jurisdiction*, but is made, to all intents and purposes, *part* of the city of Bristol. With regard to the raising of money hereafter for the purposes of reimbursement, there may be a difficulty, but that is a matter for future consideration. The question at present only is, whether an action will lie against the inhabitants of Bristol; and I think, upon a consideration of all the acts, that an action certainly will lie.

PARKE, J.—The act of parliament requires that in cases where the hundred would be liable to pay compensation to persons sustaining damage from the destruction of their houses or furniture, by persons riotously assembled within the hundred, a county of a city or town shall also be liable, if the offence be committed within it. Then the only question is, whether this gaol is within the city and county of the city of Bristol. If that be so, there is no further question now. The words of the act are very strong. It says that the district shall be taken to be part and parcel of Bristol, except as is afterwards excepted. Then it states the exceptions; and then the next clause repeats that it shall, except as to the matters before excepted, “be and be deemed and construed to be, to all intents and purposes whatever, part and parcel of the same city and county of



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the same city, and within the same." Nothing can be stronger than the language here used. It appears to me that the inhabitants of Bristol are clearly liable. Whether or not the county rate can be levied in this place is not the question. The only question is, where, for the present purpose, it is to be considered as locally situate; and upon this point it seems impossible to get over the strong words of the act.

PATTESON, J.—The words are very strong; and upon looking at the proviso, it certainly appears to me not to extend to this case. The question, whether the inhabitants of Bristol can make the inhabitants of Bedminster in the end either wholly pay or contribute partly to reimburse them the money which they will have been obliged to pay in the shape of compensation, is another question which may be raised hereafter, but does not arise upon the present inquiry.

Postea to the plaintiff.



The KING v. The Inhabitants of ST. JOHN, in BEDWARDINE, in the county of Worcester.

An indenture, by which a person of twenty-one years of age binds himself an apprentice, does not require the approval or allowance of justices where the premium is paid out of the public parochial funds, under 56 G. 3, c. 189, s. 11.

UPON an appeal against an order of removal, whereby *Robert Hinton* and his family were removed from the parish of St. John, in Bedwardine, in the county of Worcester, to the parish of Hanbury in the same county, the Court of Quarter Sessions quashed the order, subject to the opinion of this Court on the following case:

The pauper, before he was twenty-one years of age, gained a settlement in Hanbury, the appellant parish, by a hiring and service for a year with *John Stain*; after the pauper became of age, being lame, he applied for relief to the overseers of the appellant parish, who recommended him to learn some trade, but refused to bind him out; never-


theless they promised that if he could find a master, they would give four pounds. The pauper then put himself apprentice to one *Hatch*, living in the respondent parish. The parish officers of Hanbury gave the money to the pauper, who paid it to *Hatch*. The indenture was by deed, sealed by the master and the apprentice. Whilst under this indenture, the pauper slept more than forty nights in the respondent parish, and is settled there if the indenture be good in law.

The question for the consideration of the Court is, whether a person apprenticed under the circumstances stated in the case, and after he is twenty-one years of age, is a poor child within the meaning of the 56 *Geo. 3*, c. 139, s. 11.

*F. V. Lee*, in support of the order of sessions. By 5 *Eliz.* c. 4, householders dwelling in a town corporate might take apprentices for seven years, so as the term and years of such apprentice did not expire or determine before such apprentice should be of the age of twenty-four years; and by 43 *Eliz.* c. 2, churchwardens and overseers are empowered, with assent of two justices of the peace, to bind any poor children to be apprentices, where they shall see convenient, till such man-child shall come to the age of four and twenty years, and such woman-child to the age of one and twenty years or the time of her marriage. It will be contended on the other side, that inasmuch as by these acts a power is given to bind until the apprentice is of the age of twenty-four years, the binding in this case is effectual and valid, although it was a binding after the pauper was of the age of twenty-one years. The 5 *Eliz.* c. 4, s. 36, and 18 *Geo. 3*, c. 36, relieve this case from all doubt. By the former it is provided that no person shall, by force or color of that statute, be bounden to enter into any apprenticeship other than such as be under the age of twenty-one years; and by the statute of 18 *Geo. 3*, that when any

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First point:  
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man-child shall be bound to be an apprentice, by virtue of and under the authority of 43 *Eliz.* such child shall be bound to be an apprentice for no longer term than till such child shall come to the age of twenty-one years. The pauper in this case is not one of the class of persons whom the legislature intended to protect, when passing the 56 *Geo. 3.* That act was passed for the purpose of protecting infant paupers from the carelessness of parish officers, in placing them with improper masters. The magistrates, by the 56 *Geo. 3.*, are placed in the character, and are required to fulfil the duties of parents in selecting and approving of a proper master for the apprentice. If a person is of the age of twenty-one years, he does not want the protection of the magistrates, and has sufficient discretion to choose a master himself. The whole of the provisions in 56 *Geo. 3.*, evidently from the nature of them, refer to infants, and not to adults.

Second point:  
 What, an expense out of public parochial funds by reason of indenture of apprenticeship.

Assuming that the pauper is a poor child within 56 *Geo. 3.*, c. 139, the next question which arises is, whether the binding is within the 11th section of that statute, which after reciting the 43 *Eliz.* c. 2, enacts that no indenture of apprenticeship, by reason of which any expense whatever shall at any time be incurred by the public parochial funds, shall be valid and effectual unless approved of by two justices of the peace under their hands and seals, according to the provisions of the said act and of this act. There was no payment in this case on the part of the parish officers for the purpose of binding the pauper apprentice. He was in indigent circumstances and applied to the parish officers for relief, and a sum of money was given to him which he paid to his master. This is not a case within the purview of that section, and *Rex v. St. Peter, Hereford* (a), shows that this section must be construed with some restrictions, and that the literal meaning of the words is not in all cases to be adopted as the rule of construction; nor is every case

(a) 1 B. & Ad. 917.

in which the parish officers pay the premium within the act;  
*Rex v. Arundel* (a), *Rex v. Mattishall* (b).

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 First point.

*Godson*, contra. The real question before the Court is, whether the pauper at the time of the binding was a poor child within the meaning of the 56 Geo. 3. It is clear that the acts of *Eliz.* contemplated that a person might be a poor child, or rather that he might require the aid of the justices until he was of the age of 24 years. A person is not emancipated by arriving at the age of 21, if he continue to be part of his father's family; *Rex v. Sowerby* (c). The word "child" in these statutes is not used in the popular sense, but in a legal sense, and the fallacy of the argument on the other side consists in laying too much stress on the word *child*.

As to the second question. By the 11th section of the Second point. 56 Geo. 3, any indenture of apprenticeship of a person, if any part of the consideration for it, or the expense relating to it, is paid out of the parish funds, is invalid and void, unless it receive the assent of two justices of the peace. In *Rex v. St. Paul, Exeter* (d), *Bayley*, J. in delivering the judgment of the Court says, "On carefully considering 56 Geo. 3, c. 139, we are of opinion that the first ten sections apply to cases where the parish officers are parties to the indenture of apprenticeship, and the eleventh section to cases where the parish officers do not join in the indenture, but where some part of the expense attending the indenture is defrayed out of the public parochial funds. That this is the meaning of the eleventh section, appears to us to be manifest from the use of the word clandestinely in that section. The mischief recited in the preamble to that section is, that the premium or a part of the premium was clandestinely provided by parish officers, who were thus enabled to bind out poor children without the sanction of justices; and for remedying that mischief it provides, that no

(a) 5 M. &amp; S. 257.

(c) 2 East, 276.

(b) 3 M. &amp; R. 386.

(d) 5 M. &amp; R. 94.

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indenture, by reason of which such expense shall be incurred, shall be valid, unless approved of by two justices under their hands and seals (a)." *Rex v. St. Peter* (b) is distinguishable from the present case, as here the pauper was actually chargeable to the parish which advanced the money.

First point.

DENMAN, C. J.—It is impossible to say that a person of full age is a poor child within the meaning of the act in question. Although parties may be bound so as to continue apprentices until they are 24 years of age, it does not follow that a person of the age of 21 may by virtue of this act be bound apprentice. The argument would go to this, that poor persons of 70 years of age might be bound out apprentices. With regard to the 11th section, it is said, that no indenture of apprenticeship is valid, where any expense whatever has been incurred by the parish, unless approved of by two justices of the peace under their hands and seals. Though the enacting words of that section are large, they do not appear to me to extend to this case. The introductory part of the section states what are the mischiefs the legislature intended to remedy. The words of the enacting part of the section ought to have an effect limited to the mischief mentioned in the recital. Besides, the enacting part says, that the indenture must be assented to by the justices, according to the provisions of this act, and the act extends to poor infant children only. Nor do I think that the case of *The King v. The Inhabitants of St. Paul, Exeter*, extends the construction of this act any further.

LITTLEDAL, J. concurred.

First point.

PARKE, J.—It is very clear that the apprentice in this case is not a poor child within the meaning of the act of 56 Geo. 3. It appears to me that by the 11th section the legislature contemplated a person under the age of 21 years. The first ten sections of the statute clearly relate only to children in the ordinary sense of the term, persons

(a) 10 Barn. & Cress. 12.

(b) 1 Barn. & Adol. 917.

under the age of 21 years. In the 11th section, the mischief intended to be remedied is, in the first place, recited; then come the words, "no indenture of apprenticeship shall be valid, by reason of which any expense whatever shall at any time be incurred by the public parochial funds." But these words must be controlled by the precedent recital. Then these words follow: "Unless approved of by two justices of the peace, under their hands and seals, according to the provisions of the said act and of this act." Looking at the former act and at this act, it is clear that they provide only for the apprenticing of poor children under the age of 21 years.

PATTESON, J. concurred.

Order of Sessions confirmed.

The KING v. The Inhabitants of GREAT GLENN, in the County of Leicester.


UPON an appeal against an order for the removal of *Mary Stevens*, widow, and her three children, from the parish of Great Glenn, in the county of Leicester, to the parish of Leir, in the same county, the sessions quashed the order, subject to the opinion of this Court upon the following case:

The pauper was married to *John Stevens* in April, 1827, and on their marriage she and her husband went to live in a house in the appellant parish, which he had taken a day or two before of *Thomas Eaglesfield*, as tenant from year to year, at the rent of 3*l.* per annum, which was a rack rent. They continued to live in this house until the 14th of May, 1831, on which day the husband died. The pauper continued the possession from thence for about a fortnight or three weeks; she then went to the respondent parish for a few days, namely, from Monday till Saturday, when she

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When it is the duty of a party to take out letters of administration, his settlement in *A.* where the estate of the intestate lies, is not vitiated by shewing that administration was taken out at the sole instance of the parish officers of *B.*, for the purpose of transferring the settlement of the party from *B.* to *A.*

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returned, having left her sister in possession of the house during her absence. She was relieved there by the respondents until the third of December following. On the next second of June after her husband's death, the pauper had an interview with the landlord, and told him she wished to pay the rent weekly; he assented, and it was agreed that the rent should be fourteen pence per week, which the pauper paid accordingly, until the 5th of March, 1832, when she quitted in consequence of having received a week's notice to quit. Some time in August, 1831, the pauper took out letters of administration to her husband, under the following circumstances. In that month the attorney for the respondents, accompanied by a clergyman, called upon the pauper, and administered the oath, saying, "We shall be obliged to get you to take out letters of administration: I dare say you don't understand it; you have a right to take out letters if you like, and if you will leave it to me, I'll do whatever is necessary." This explanation was not understood by the pauper; she said she had no objection, but hoped they would not take her goods, which she believed the respondent parish were going to lay claim to. The pauper was ignorant of administering any farther than she understood her oath was to declare that what she had was not worth 20*l.*, and she never heard until the sixth of December following that letters of administration had been taken out, when the attorney for the respondents laid some papers on a table before her, and said those are your letters of administration. At the death of her husband, the pauper's (i. e. her husband's) goods were not worth more than 5*l.* of which 3*l.* was due for rent, and 2*l.* for other debts. The letters of administration were taken out by the direction and at the expense of the respondent parish, for the purpose of settling the pauper in the appellant parish. The pauper resided forty days and upwards in the house, late her husband's, in the appellant parish, after the grant of the letters of administration. Whereupon the order of re-

moval now appealed against was obtained. The Court of Quarter Sessions found that there was fraud in taking out letters of administration, and discharged the order.

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*Humfrey and Burnaby*, in support of the Order of Sessions. The letters of administration will not have the effect of conferring a settlement upon the pauper in the parish in which her husband resided. In the first place, the fraud practised would vitiate the settlement. It is laid down both in *Nolan and Bott*, that no settlement can be legal which is brought about by practice or compulsion. There are many other authorities to the same effect; *Rex v. Tillingham (a)*; *Dalton*, 236; *Barnes*, 623; *Rex v. Halifax (b)*. The only exception to this rule is, where the settlement is acquired by marriage, *Rex v. Birmingham (c)*; and for this exception the reason is obvious.

First point:  
Fraud.

Secondly. It appears as a fact, that the pauper, after her husband's death, had an interview with her landlord, and changed the terms of the tenancy, making that which was before a holding from year to year a tenancy from week to week. The letters of administration vested in the pauper the right to the term from year to year, *Doe v. Carter (d)*; but the agreement between the parties to hold from week to week was a surrender of the old tenancy from year to year so vested in her as administratrix; *Roe v. Archbishop of York (e)*. The letters of administration could not have a retrospective operation in this case; *Rex v. Inhabitants of Horsley (f)*.

Second point:  
Alteration of  
tenancy.

*Amos, Hildyard, and White*, contra. There was not that species of fraud practised in this case as will avoid a settlement. To vitiate a settlement, it is not sufficient that there is a fraudulent motive on the part of the parish officers; there must be some attempt to make that appear to

First point.

(a) 1 B. & Adol. 180.

(d) 3 Term Rep. 13.

(b) Burr. S. C. 806.

(e) 6 East, 66.

(c) 2 Mann. & Ryl. 230; 8 B. &

(f) 8 East, 405.

C. 29.



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be done which really has not been done. In *Rex v. Mursley (a)*, the pauper was hired three days after Michaelmas until the Michaelmas following. The Court of Sessions stated, that such transactions on the part of the masters to prevent servants gaining settlements by virtue of their services, were fraudulent. But the Court held that this was not such a fraud as would vitiate the settlement; *Buller, J.* saying, "the question of fraud only arises where in truth there is such an hiring, but the parties endeavour to colour it in order to prevent the pauper's gaining a settlement." *Rex v. Tillingham* establishes the same position. The question in that case was, whether the pauper gained a settlement by renting a tenement. The pauper who was settled in Tillingham applied to the officers of that parish for relief, they gave him a sum of money which enabled him to pay his landlord a year's rent for a tenement which he occupied in the parish of Bradwell. The Court held that it was a question of fact for the sessions, whether this payment was fraudulent or not, but if the sessions were of opinion upon the evidence that the money was paid to enable the pauper to gain a settlement in Bradwell, they ought to find fraud. If the money was paid with such a view by the parish officers of Tillingham, it was an attempt by them to make it appear that the payment was made by the pauper, when in fact it was made by themselves. *Rex v. Birmingham* is directly in point. There the marriage was brought about by the parish officers. It is even stronger than the present case, where it was the duty of the pauper to take out letters of administration—a duty which she was required to perform under a penalty of 50*l.* The pauper had a legal right to take out letters of administration, and it cannot be a fraud to enable her to assume those rights. *Rex v. Kibworth Harcourt (b)* is another instance, in which conduct, apparently fraudulent on the part of the parish officers, did not vitiate the settlement. Assuming that

(a) 1 T. R. 694.

(b) 1 Mann. & Ryl. 691; 7 B. & C. 790.

the conduct of the parish officers of Great Glenn was fraudulent, the letters of administration are in force until recalled by the Ecclesiastical Court; a Court of common law cannot receive evidence to invalidate them. In *Allen v. Dundas (a)*, it was held that a probate of a will, so long as it remains unrepealed, cannot be impeached in a temporal court. If a debt had been due to the husband, and the pauper had sued for it after the grant of administration, surely the debtor could not have pleaded *ne unques administratrix* on the ground that fraud had been practised in taking out administration.

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But it is said that the wife surrendered the tenancy from year to year. The alteration in the terms took place before the grant of administration, and an administratrix cannot surrender before the letters of administration are actually taken out. In *Middleton's case (b)*, it is said, "If A. releases, and afterwards takes administration, it shall not bar him, for the right of action was not in him at the time of the release." The pauper, therefore, was still possessed of the tenancy from year to year; and having, as appears by the case, resided in the parish of Leir forty days after she had taken out administration, she thereby gained a settlement. *Rex v. Ynyscynhaiarn (c)*.

Second point.

DENMAN, C. J.—The first question is, whether the settlement is altogether void, because the sessions have found fraud in taking out the letters of administration. No one can approve of what has been done, but I am of opinion that there is no sufficient fraud found. The pauper was entitled to the estate of her husband. She became his administratrix, and I think that all the legal consequences must follow. Then comes the second question, whether the pauper resided forty days on the estate of her husband. It is left doubtful upon the case whether after the administration was granted she was in possession of the

First point.

Second point.

(a) 3 T. R. 125. (b) 5 Co. Rep. 28. (c) 1 M. & R. 16; 7 B. & C. 233.

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First point.

estate created by herself or of that of her husband. The case must therefore go back to the sessions in order that the terms of the occupation may be ascertained.

Second point.

LITLEDAL, J.—The letters of administration are in force. I do not think that, under the whole of the circumstances, we can decide this case upon the ground of fraud, although certainly the conduct of the respondent parish is not to be defended. Upon the other question, whether the pauper resided upon her husband's estate, it appears probable that the sessions will come to the conclusion that she converted the estate into a weekly tenancy, and if so, she was living on her own estate. It is perfectly true that the wife could not surrender her husband's estate before taking out letters of administration; but that does not affect the question here. Whatever her *rights* might be as to continuing her husband's estate, she appears not to have exercised them, but to have been residing on the estate created by herself.

Second point.

PARKE, J.—I should have been quite satisfied to have decided this case, if the sessions had drawn the inference, which they probably will draw, that before she took out letters of administration the pauper changed the nature of the holding. From the facts stated that appears to have been the case. It is possible however that the wife may have disaffirmed the estate which she herself had taken; but that is not the question. The question is, whether she continued to reside on an estate from year to year. She paid a weekly rent, and there is abundance of evidence to shew that she occupied under a weekly tenancy.

First point.

The facts stated in the case are not sufficient to warrant the finding of fraud. The pauper had a consenting mind.

Second point.

PATTESON, J.—I am of the same opinion. I apprehend it to be quite clear that in order to gain a settlement the administrator must reside forty days on the estate of the intestate. It is immaterial in this case whether the pauper

had a right to continue her husband's estate or not, if it be found as a fact that she did not actually reside in it. There was no sufficient fraud to vitiate the settlement, although the letters of administration may have been taken out for a fraudulent purpose. It certainly was the duty of the wife to take out letters of administration.

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Case sent back to the sessions on the  
second point.

The KING v. The Inhabitants of RUTHIN.

UPON appeal against an order whereby *David Jones*, his wife and family, were removed from the parish of Ruthin, in the county of Denbigh, to the parish of Cevan in the same county, the Court of Quarter Sessions quashed the order, subject to the opinion of this Court upon the following case.

Under 6 G. 4, c. 57, a settlement may be gained by hiring a tenement, if the rent be actually paid to the landlord, whether it be paid by the tenant or by another person.

The pauper's settlement was in the appellant parish previously to his occupation of a tenement and lands in the parish of Llanrhaiadr in Cinmerch, in the county of Denbigh, under the following circumstances. Previously to St. Andrew's day (30th November), 1829, the pauper took from Mr. *Eddisbury*, (the mortgagee in possession for a term of 500 years who had foreclosed,) a farm called Tynyfryth, in the same parish of Llanrhaiadr in Cinmerch, as tenant from year to year, at the rent of 24*l*. The tenancy was to commence according to the custom of the country, viz. as to the land from St. Andrew's day, 1829, and as to the farm-house and outbuildings from the first of May following: the rent was made payable half-yearly, on the 25th of March, and the 29th of September following, though according to the custom the first half-year was not to be called for until St. Andrew's day, 1830, and the second half-year on the first of May, 1831, and so on during the tenancy. Pursuant to the contract, the pauper entered

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upon the premises at the appointed periods, and occupied the lands from the 30th November, 1829, until after the 30th November, 1830, and until a little before Christmas in that year, having in fact commenced tilling the land for the second year; and he occupied the house and outbuildings until first of May, 1831. Mr. *Eddisbury*, during the pauper's occupation, being desirous of selling the property even at a sacrifice of some part of the mortgage money due to him, intimated his intention to *T. Shaw*, (the mortgagor), and named a sum he would accept in satisfaction of his mortgage debt; and added, that if *T. Shaw* could find a purchaser, he would permit him to have any surplus as a compensation for his trouble, and in consideration of his concurring in the sale and conveying his reversion. During the early part of the pauper's tenancy, a contract was made through the medium of *T. Shaw* for the sale of the mortgaged premises to Mr. *Ignatius Williams*, at a price exceeding the sum agreed to be taken by Mr. *Eddisbury*, in satisfaction of his mortgage debt. The title having been approved of, the parties fixed a day in August, 1830, to complete the purchase, and Mr. *Eddisbury*, *T. Shaw*, and *Williams*, the purchaser, and their solicitors, met at Ruthin, agreeably to appointment, and were attended by the pauper's wife, whose husband sent her on his behalf, he having been desired by *T. Shaw* to attend to pay his half-year's rent. On Mr. *Eddisbury* insisting on being paid the half-year's rent due the 25th of March, 1830, and declining to complete the sale without it, the pauper's wife said that her husband was then unprepared, owing to its being demanded before the usual time, viz. St. Andrew's day, though, as before stated, it was due the 25th of March preceding. *Shaw*, being anxious to avoid delay, and to get the business concluded, agreed without the previous knowledge or request of the pauper, but with the privity and consent of pauper's wife, to pay the 12*l.* for the pauper, and the amount was then paid by *Williams's* solicitor, at the request of *Shaw*, out of *Shaw's* surplus purchase money, and a

receipt was taken from Mr. *Eddisbury*, for 12*l.* being the amount of the half-year's rent due from the pauper. The receipt which was produced in evidence stated the 12*l.* to have been received of *D. Jones*, by the payment of *Shaw*, and was kept by *Shaw*. *Eddisbury*, so far as he was concerned, left it to *Shaw* and the pauper to arrange the repayment of the first half-year's rent as they could, and the pauper acknowledged, on the trial of the appeal, that *Shaw* had paid the rent for him, and he proved that there was an unsettled account between them relating to money transactions, the sale of corn, and charges for team labour, part of which was due to the pauper previously to his taking the farm, and in which account he (the pauper) gave *Shaw* credit for the rent; and he swore that the balance was still in his, the pauper's favour, but he admitted that there were disputes between him and *Shaw*, and that a lawsuit had been commenced against him by *Shaw* for the 12*l.*, but he had not heard any thing about it for a year or more. As *Williams* was only to have the rents from the completion of the purchase, it was agreed between Mr. *Eddisbury*, *Shaw*, and *Williams*, that *Shaw* should have the portion of the second half-year's rent, which had accrued from the 25th of March, 1830, up to the day in August in that year when the settlement of the purchase took place at Ruthin, and *Williams* was to have the remainder, being about six weeks' rent. *Williams*, in order to simplify the business respecting the payment of the second half-year's rent, paid to *Shaw* at Ruthin the proportion of rent from the 25th of March to the day in August when the purchase was completed, and which he expected he would be reimbursed when the pauper should pay his second half-year's rent at the usual period. The pauper was not present at the time, and had no knowledge of the transaction. The pauper not being under notice to quit, and having it in his own power to retain the premises a year longer, *Williams*, who was desirous of getting rid of him, entered into a treaty in December, 1830, for immediate possession of the lands, and for possession of the

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house and outbuildings on the first of May, 1831. The pauper at first asked the sum of 24*l.* as a consideration for quitting the farm, but eventually he agreed to leave upon having the second half-year's rent then due remitted, or forgiven to him as a consideration for quitting, and *Williams* agreed to the terms. The pauper, in compliance with his agreement, quitted the lands in December, 1830, and the house and outbuildings on the first of May, 1831, and was on that account forgiven that, viz. the last half-year's rent, and discharged from it. The pauper had not to the day of trial actually repaid *Shaw* the amount of the half-year's rent so paid for him to *Eddisbury*, except in the manner before stated, viz. that he had given *Shaw* credit in account; that a suit was pending, and an unsettled account existed between *Shaw* and himself, upon which account *Shaw* owed him a balance, and that he had not heard anything of the lawsuit for a year or more; and as to his second half-year's rent, the pauper proved that he had paid it to *Williams*, or satisfied him for it by the contract in the manner before described, and which *Williams* also proved on the trial. The pauper also proved that he was fully able to have paid the rent, as he quitted with a stock sufficient to have met the landlord's demands. The year's holding as to the land, which was the principal taking, was begun and concluded, and the whole rent was due and paid or satisfied as before mentioned, while the 6 *Geo.* 4, c. 57, was in operation, and before the passing of the 1 *Will.* 4, c. 18, though the time originally allowed for the payment of the second half-year's proportion had not then arrived, but the year's holding of the house and outbuildings was not concluded until the 1st of May, which was after the latter act had come into operation. The Court found that the pauper gained a settlement in Llanrhaiadr in Cinmerch.

*Justice*, in support of the order of sessions. The question for the determination of the Court is, whether the payment of rent under the circumstances stated in the case is sufficient.

Under 6 Geo. 4, c. 57, it is necessary that the premises should be bonâ fide rented at 10*l.* a-year at the least for one year, that the party should occupy it under such yearly hiring, and that the rent should be actually paid for one year, but that act does not require that the rent should be paid by the hand of the party; *Rex v. Kibworth Harcourt* (a). In this case the whole rent was paid to the landlord. If it be disputed that the circumstances stated in the case relative to the second half-year's rent amounted to payment, the answer is, that by the 2d section of 1 W. 4, c. 18, which is decided by *Rex v. Dursley* (b) to be retrospective in its operation, the payment of rent to the amount of 10*l.*, where the whole rent exceeds that sum, is sufficient for the purpose of gaining a settlement. The law relative to the hand by which payment of rent is to be made, has been altered by the 1st section of 1 W. 4, c. 18, which requires that the rent shall be paid by the party hiring the house or land. But this section is not retrospective, and therefore does not affect the present settlement.

If, however, the Court should think that the first section as well as the second is retrospective, upon reference to the circumstances stated in the special case, it will be found that the first half-year's rent was in fact paid by the pauper himself, because it was paid by *Shaw*, as his agent, and repaid to *Shaw* in the account, and therefore even that statute is satisfied. With regard to the second half-year's rent, that was paid to the landlord by the pauper in the shape of a consideration for an immediate surrender of the farm.

*John Jervis, contra.* The authority of *Rex v. Kibworth Harcourt*, and *Rex v. Dursley*, is not disputed. The latter case decides that the 2d section of 1 W. 4, c. 18, is retrospective in its operation, but it does not decide that the 1st section is not equally so. That act was passed to

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First point :  
Payment of  
rent, by whom  
to be made.

Second point:  
Retrospective  
operation of  
1 W. 4, c. 18.

Second point.

(a) 1 M. & Ryl. 691; 7 B. & C. 790. (b) 3 B. & Adol. 465.



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clear up the doubts which had arisen with respect to the intentions of the legislature, in passing the 6th *Geo.* 4, c. 57. This being the object of the statute, it must be taken to be a declaratory statute, and therefore its provisions are retrospective.

First point.

Admitting that the rent need not be paid by the pauper, yet it must be actually paid by some person. With respect to the first half year, the wife was not authorized to adopt the payment made on behalf of her husband, and if *Shaw* had brought an action against the pauper for money paid by him for the use of the pauper, he would not have been able to show, from the circumstances stated in the case, that the payment was made with the assent of the pauper. It was a mere arrangement between third parties, to which the pauper was in no way privy. And as to the second half-year's rent, there was no payment whatever: all that the transaction could amount to was accord and satisfaction for the rent.

First point.

DENMAN, C. J.—I think the sessions might safely have decided this case themselves. There was enough to shew that the rent was satisfied to the party entitled to receive it, and the act does not require that it should be paid by the tenant.

LITTLEDALE, J. concurred.

First and second points.

PARKE, J.—The payment by any one, as the law then stood, was sufficient. The first clause only of 1 *W.* 4, is retrospective. It cannot be said that the rent has not been paid, since no one can now demand it.

PATTESON, J. concurred.

Order of Sessions confirmed.

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## The KING v. The Inhabitants of BINGLEY.

BY an order of removal, under the hands and seals of two justices, addressed to the churchwardens and overseers of the poor of the township of Heslington St. Lawrence, in the East Riding of the county of York, and to the churchwardens and overseers of the poor of the township of Bingley, in the West Riding, the legal settlement of *Isabella Rushworth* and her five children was adjudged to be in the township of B. The pauper and her family were, in pursuance of the order, removed from the township of Heslington St. Lawrence to the township of B.

The parish of Bingley consists of several townships, of which the township of B. is one. The parish of B. maintains its own poor collectively, and there are no separate overseers for the township of B. Upon an appeal to the quarter sessions, the order was confirmed, subject to the opinion of this Court.

Where in the parish of B. there are several townships, not separately supporting their poor, one of which is called the township of B., an order of removal directed to the churchwardens and overseers of the township of B. may be amended by the sessions into an order directed to the churchwardens and overseers of the parish of B.

*Wrangham*, in support of the order of sessions. The appeal was heard upon the merits before the objection to the order was taken. The appellants are estopped from taking this objection, for they accepted the pauper and the order, and appealed against the order as the churchwardens and overseers of the township of B. This is a mere misdescription of the district, and not a direction to an improper district, *i. e.* a district not maintaining its own poor separately; *Rex v. Kirkby Stephen*(a); and the justices are not bound to take notice of divisions of parishes; *Spitalfields v. Bromley* (b). Besides, the order is addressed to the churchwardens as well as the overseers of the township of B. Now churchwardens are officers of the whole parish. The only effect of quashing the order upon a point of form, would be to put the two parishes to the expense of a second removal, as an order quashed on defect of form is not final between the two places, like an

(a) Barr. S. C. 654.

(b) 16 Vin. Abr. 468.

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order quashed on the merits; *Rex v. St. Andrew, Holborn* (a). If the objection had been taken at the sessions, before the case was gone into upon the merits, that Court might, under the act of 5 Geo. 2, c. 119, s. 1, have amended the order. In *Rex v. Amluch* (b), in which case the order of removal described the place to which the pauper was thereby removed, as a parish, whereas in fact it was a vill only, the Court held that the sessions might amend the order by inserting the words "or vill."

*Starkie and Hildyard*, contra. The error in the order was made by the other party, and it was their duty to apply to the sessions to amend the order. It is quite clear that where there is a large district maintaining its own poor, a removal to a portion of it is bad. If that were not so, removals might in the end take place to an individual house; *The King v. Swalcliffe* (c). [*Parke, J.* That was not a removal to a township, but only to a populous place.] It may be inferred that it was a township, because it is said to be a populous district, part of the parish of Wichford, maintaining its own poor in common with Wichford. One of the questions there was, whether justices have authority to remove a pauper except to a parish or to a district exclusively maintaining its own poor. Lord *Mansfield* said, "The justices have no authority to remove to such a place as Ascott; it is no removal at all; it is a mere nullity. The justices might as well make orders of removal to a man's house." It however is not material whether it be a township or not, unless it has acquired a peculiar character by the operation of the act 13 & 14 C. 2, and is thus made in effect a parish. *Rex v. Kirkby Stephen* bears no analogy to this case. There was a material circumstance in that case which differs it from the present, namely, that there had been no appeal; it was thought that there ought to have been an appeal, and that the pauper having been received without appeal made, the parties could not afterwards object to the form of the order. Lord *Mansfield*, C. J. there

(a) 6 T. R. 613. (b) 4 B. & C. 757. (c) 2 Bott by Const. 633.

says, "The township of Kirkby Stephen ought in this case to have appealed. They could not get rid of this order but by appealing."

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DENMAN, C. J.—There was a case of *Rex v. Carmarthen* (a) decided in Hilary term, which was very similar to this case. We wish to see that case before we give judgment.

On a subsequent day,

DENMAN, C. J. said, we have seen the case in Hilary term, which is something analogous to this case. There is a township of Bingley within the parish of that name. We therefore think it fit that the order should be sent back to the sessions to be amended.

Order sent back to be amended.

(a) *Ante*, vol. i. p. 368.

#### The KING v. The Inhabitants of BANBURY.

UPON an appeal against an order of two justices of the peace, whereby *Richard Carpenter* was removed from Banbury to Witney, both in the county of Oxford, the Court of Quarter Sessions quashed the order, subject to the opinion of this Court on the following case:

By indenture of apprenticeship, dated the 10th September *A.* is apprenticed to *B.* to be by *B.* instructed in his trade, and provided with meat and other necessities. *B.* having no employment for *A.* advises him to go to work with *C.*, at the same trade, and promises to give *A.* a watch, if *A.* will not trouble him or the parish till the end of his time. *A.* accordingly applies to *C.* who employs him at piece-work, out of which *A.* provides himself with necessities. *A.* afterwards, with the assent of *B.*, removes from the service of *C.* into that of *D.*, whom he serves in the same trade. At the end of the period for which he was apprenticed, *A.* receives the watch in pursuance of the promise:—Held, by *Denman, C. J.*, *Littledale, J.* and *Patteson, J.*, *dissentiente Parke, J.*, that the service with *C.* and *D.* was referable to the indenture, and that *A.* gained a settlement in the parish in which he inhabited during such service.

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ber, 1801, the pauper was bound apprentice by the trustees of a charity in Charlbury, to *James Hobbs*, of Witney, tailor and breeches-maker, to serve from the 10th day of September, 1797 (*a*), until the full end and term of seven years. The master's covenants were to teach the trade, and to find unto the apprentice sufficient meat, drink, washing, lodging, clothing, and all other necessities, during the term. The pauper entered into his service on the date of the indenture, at which time he was about twenty years old. The pauper served *Hobbs* under the indenture in Witney about half a year; *Hobbs* then failed in business, but did not become bankrupt, and having little or no work for the pauper to do, said to him, "*Richard*, its of no use your stopping here, I've nothing for you to do; you had better go if you can get a place; *Barry*, of Bloxham, wants hands, and he's a Witney man, you may go and work for him if you like; and if you do not come troublesome to me nor Witney parish till the end of your time, you shall have my watch," which he then shewed him. The pauper went to *Barry*, at Bloxham, which is about twenty miles from Witney, paying his own conveyance down; he agreed with *Barry* to work for him, and to be paid half-a-crown for making breeches, which is the regular price. *Barry* often went to Witney, and carried friendly messages between the pauper and *Hobbs*. The pauper worked for *Barry*, in Bloxham parish, a year, maintaining himself by the wages he received. He then heard that *Baker*, of Banbury, wanted hands, and that he gave better wages than *Barry*; and he applied by letter to *Hobbs* for his leave to work for *Baker*, and received a verbal assent from him.

(*a*) By inserting this terminus, the parties probably supposed that they were creating a seven years' apprenticeship; but the legal operation of the language used was, simply to create an apprenticeship commencing 10th September, 1801, and terminating at the time at

which a term of seven years, to be computed from 10th September, 1797, would have terminated; the legal effect of the instrument would have been precisely the same if the words had been "to serve from the 10th day of September, 1697, for the term of 107 years."


The pauper went to *Baker* and agreed to work for him, to make breeches at 2s. 9d. a pair. After the pauper had been with *Baker* about three months, *Hobbs* came down to Banbury to buy leather; he told the pauper he was glad to see him doing so well for himself, and going on so comfortably. He gave the pauper 1s. and they drank together, and *Hobbs* again promised him the watch, when his time was out. *Hobbs* afterwards came down again to buy leather, and again saw the pauper at *Baker's* at work, and repeated his promise of the watch. The pauper worked for *Baker* two years, living the whole time in Banbury, and then left. *Hobbs* then sent the pauper the watch. The pauper maintained himself by the wages he received from *Barry* and *Baker*, and *Hobbs* had nothing to do with his earnings.

The question for the opinion of the Court is, whether the residence in Bloxham and Banbury was a residence under the indenture, so as to gain a settlement in either of those places.

*Walesby*, in support of the order of sessions. All the ingredients necessary to confer a settlement in Banbury, are found in this case. Every fact found leads to the conclusion that the pauper, during the time that he was working for *Barry* and *Baker*, was acting with the permission and subject to the controul and recall of his master. The master gave the apprentice leave to serve each individual. It was not an indiscriminate permission by the master to serve any one whom the apprentice pleased. Where the master's permission is given to the apprentice to serve a particular person, he by service of such person gains a settlement. In *Rex v. Shebbear (a)*, Lord *Kenyon* says, "Here the master was applied to for his consent to the particular person named, and he expressed his approbation of the apprentice going there, telling him that it would be advantageous for him to learn the trade. This then was not an indiscri-

(a) 1 East, 73.

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*minate leave to serve any person, but a particular consent to a particular service,* and this is the plain line of distinction between all the cases, which, it is hoped, will make an end of all such questions in future." In *Rex v. The Holy Trinity in the Minories* (a), the master recommended his apprentice to go to a particular person in the same business. It was held that the apprentice gained a settlement by such service, and the same rule was laid down as in *Rex v. Shebbear*. Here there is this additional fact, that the second master knew of the arrangement, and knew that the pauper was an apprentice. *Rex v. Whitchurch* (b), and *Rex v. Ashby-de-la-Zouch* (c), may be quoted on the other side; but both those cases are distinguishable from the present case. In *Rex v. Whitchurch* the first master did not know whom the apprentice was going to serve, nor did the second master know that the pauper was an apprentice; and in *Rex v. Ashby-de-la-Zouch*, the apprentice was hired by the second master; without knowledge on his part that she was an apprentice, so that the relation of master and apprentice could not exist. Here, there was no hiring for a specific time; the apprentice went to work to relieve his master from the cost of maintaining him.

*Chilton*, contra. The employment of the apprentice by the second master must be in the capacity of an apprentice, and not in any other character, such as that of a servant or journeyman. It has been stated that the second master, when he took the pauper into his service, knew that he was an apprentice, but that does not sufficiently appear. This is like the case of *Rex v. Crediton* (d), where the master told the apprentice that he had no further employment for him, and he might go where he pleased: the apprentice hearing of another master was going to him, when he was met by his original master, who asked him where he was

(a) 3 T. R. 605.

(c) 1 B. & Ald. 116.

(b) 2 D. & R. 845; 1 B. & C.

(d) 1 East, 59.

going; upon which he told him where he was going, and the master replied, "you may go there or where you please." It was held that the pauper did not gain a settlement by serving the second master. In *Rex v. St Helen's, Stonegate* (a), the apprentice told his master that he wished to provide and work for himself; to which the master assented, and said he might do the best he could for himself. The pauper accordingly engaged to work for another master. Some time afterwards the second master met the original master and told him that the pauper was working for him; to which he answered, "I am glad of it, he was a bad lad, and I could make nothing of him." It was held that the apprentice did not gain a settlement by serving the second master. That case is much stronger than the present, because the second master knew the pauper was an apprentice, and the first master assented to the service, and whether the assent is given before or after the commencement of the service is immaterial, as appears from *Rex v. Bradstone* (b). In *Rex v. Whitchurch* the apprentice asked his mistress's leave to go into another service, to which she consented. The pauper then hired himself as a yearly servant to a master in another parish, and informed his mistress of the fact, to which she said "very well, I am not against it." In a few days he went to his new place, and in about a fortnight returned for his clothes to his mistress, who said she hoped he liked his new place. It was held that the pauper did not gain a settlement under the indenture in the parish where his master resided. This case more resembles *Rex v. Ship-ton* (c), than any case that has yet been cited. The master of a parish apprentice not having sufficient work for him, proposed to the apprentice to go to a farm in a different parish occupied by the sister of the master. The pauper assented to the proposal, and agreed with her to work for a twelve-month for his meat and drink. He worked there four years and four months. During the first two years he

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(a) 1 East, 285.

(b) 2 Bott. 422.

(c) 8 B. &amp; C. 88.



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received from her meat and drink, and during the third and fourth he received wages. It was held that no settlement was gained by the service with the sister, inasmuch as the service was not under the indentures of apprenticeship; and secondly, that there had been a putting away of the apprentice without the consent of the justices. This case is much stronger than any, because the Court, if they had thought proper, might have disposed of the case upon the second ground. *Rex v. Ecclesfield (a)* shews, that if the service by the apprentice can be attributed to any other contract than that contained in the indenture of apprenticeship, the pauper will not gain a settlement by such service. [*Patteson, J.* How do you distinguish this case from *Rex v. The Holy Trinity in the Minorities*?] *Rex v. Whitchurch* must be taken to have over-ruled that case, which seems to have been decided before the rule was established that the service must be in some way referable to the indenture. [*Parke, J.* There is nothing in the statute which requires a service under the indenture, but merely a binding and inhabitation.] Whilst the pauper was working for the third master, his inhabitation was in no way referable to the indenture. He was working as a journeyman on his own account, in the same manner as if he had never been bound apprentice. [*Patteson, J.* *Rex v. Whitchurch* is certainly put partly on the ground of the want of assent by the master.] In *Rex v. Shipton* there was an express assent on the part of the master to the service.

DENMAN, C. J.—It appears to me that a settlement was gained by the subsequent service. I am averse to introduce into acts of parliament terms and definitions which are not expressly inserted in them. It has been decided by a long series of cases, that where there is a binding of the apprentice and he leaves his master and enters into the service of another, with the consent of his former master, he gains a

(a) 6 M. & S. 175.

settlement by such service. All the act (a) requires is, that there shall be a binding of the apprentice and an inhabitation by him. The first question therefore is, whether the binding continued during the whole period the apprentice was in service. I think it did. The master tells the apprentice it will be of no service to him to remain with him, and recommends him to go and work for *Barry*, and promises him his watch for so doing. The apprentice accordingly goes to *Barry* and works for him for a year; he then hears that *Baker* gives better wages, but before he goes to *Baker* he asks and receives his original master's permission. He works for *Baker* two years, during which time his first master frequently sees him, and at the end of the service he receives the watch from his original master as a reward for his good conduct. During the whole of this time the apprentice worked at the business of his first master. The apprentice and the master evidently considered that the apprenticeship continued during the whole time. They may have thought that under the circumstances in which the master was placed, the best method the apprentice could take to learn his business was to serve other persons in the same trade. For these reasons it appears to me that the subsequent service by the apprentice was referable to the indenture of apprenticeship. That there was an inhabitation by the apprentice is not disputed. There is then an inhabitation and a working by the apprentice, and the service is, I think, referable to the indenture of apprenticeship, and therefore a settlement was gained by the apprentice.


LITLEDALE, J.—I am entirely of the same opinion. The indenture of apprenticeship was never cancelled. The master never contemplated that it should be annulled. The master gave the apprentice permission to go into each service, and promised him his watch as an inducement for

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him to do so. By the deed of apprenticeship, the master was bound to provide the apprentice with board and clothing, and the apprentice went out and found all these necessities for himself. There is no doubt of the assent of the master to the acts of the apprentice. The only remaining inquiry is, whether the apprentice worked *as an apprentice*. He worked at the same trade, with his master's consent. This is a working under the indenture of apprenticeship; if it be not so, I know no mode of serving under an indenture of apprenticeship with another person, unless there is a regular formal assignment of the deed of apprenticeship. I do not know that it is necessary that the second master should know that the apprentice has the permission of the first master to work for him. In some of the cases there appears to have been notice to the second master of the character of the pauper, in others no notice was given.

PARKE, J.—I certainly wished for time to look at the authorities; at present my impression is, that no settlement was gained by the subsequent service. Under the act, the habitation must be in some way connected with the binding and referable to it. This was laid down by Lord Tenterden, in *Rex v. Whitchurch*, and also in the late case of *Rex v. Linkinhorne (a)*. It is not necessary that there should be any service in the character of an apprentice, although this is laid down in some of the old cases. All that is requisite is, that there shall be an inhabitation in the character of apprentice, and referable to the indenture of apprenticeship. The question in this case is, whether the service was in the character of a servant, or as an apprentice. The service would have been more in the character of an apprentice if the first master had communicated to the second master that the pauper was his apprentice, and had requested him to take him and educate him in his

(a) 3 B. & Ad. 419.

business. Then the inhabitation might be considered as a habitation under the indenture of apprenticeship. The case of *Rex v. The Holy Trinity in the Minories* has been relied on. In that case it will be found that the pauper clearly went to reside with the second master as an apprentice, and there was an agreement to educate him in the business. In *Rex v. Ashby-de-la-Zouch*, and *Rex v. Whitchurch*, the second master did not know that the pauper was an apprentice, and hired him as a servant; and for this reason the Court held that he did not gain a settlement, as the service must have reference to the indenture of apprenticeship. These cases were followed by *Rex v. Shipton*, which was decided upon the same principle. The service in this case was, I think, performed in the character of a servant. There was no stipulation that the pauper should be educated, or that he should be treated and act as an apprentice; on the contrary, he contracted to work by the piece.

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PATTESON, J.—The cases are very difficult to reconcile, and it is with difficulty that I come to a decision. Upon the whole I think the pauper gained a settlement by the subsequent service. I agree with my Lord *Tenterden* with respect to the rule, that the service with the second master must be referable to the contract of apprenticeship, and in furtherance of its object. The pauper in this case is bound apprentice to a tailor, who becomes bankrupt and cannot maintain him. The apprentice therefore goes to another person, a tailor, not hiring himself for any period, but working for him by the piece; whilst he is there, he finds he may do better elsewhere, and he leaves the second master and works for a third master in the same manner. All this is done with the assent of the first master. Both the parties to the original contract considered that the binding continued, and both parties were in a situation to bring an action of covenant upon the indenture. In *Rex v. Whitchurch* there was no assent on the part of the mistress to the particular service; she merely gave a general assent to go into

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another service generally. It seems to me, that whenever the contract of apprenticeship continues, and the apprentice, with the consent of his master, is working at the trade for the purpose of learning which he was bound, there is such a service as to constitute an inhabitation in the parish referable to the binding. I am sorry to differ from my brother *Parke*. It is quite impossible to reconcile all the cases.

Order of Sessions confirmed.

SMITH *v.* GOODWIN and RICHARDS.

Case will lie against a landlord who, having distrained goods sufficient to pay his rent, abandons the distress, and afterwards makes a second distress for the same rent.

*Semble*, that trespass would also lie.

**CASE.** The seventh count of the declaration stated, that on 31st August, 1831, at &c. the defendants took and distrained certain goods and chattels of the plaintiff, to wit, &c. under colour and as and for and in the name of a distress for certain rent then alleged to be due and payable from the plaintiff to the defendant *Goodwin*, for and in respect of certain premises in the possession of the plaintiff, and which goods and chattels so distrained were of more than sufficient value to have satisfied the said alleged rent, and the costs and charges of and attending such distress, and the sale of such goods under the distress and incidental thereto, to wit, at &c.: That the defendants having taken and distrained such goods &c. retained possession of the same under such distress for five days then following, and afterwards and at the expiration of that space of time, at &c. the defendants voluntarily quitted and abandoned the possession and the said goods &c. and the said distress thereupon: That although the defendants under the said distress, and by virtue thereof, could and might have satisfied the alleged arrears of rent and all reasonable and lawful charges in that behalf, nevertheless the defendants well knowing the premises, but contriving &c. afterwards, to wit, on 7th September, 1831, at &c. wrongfully, injuriously, and vexatiously made a second and another distress upon

the said goods and chattels of the plaintiff for the same identical alleged arrears of rent for and in respect whereof the said distress in this count first mentioned was made as aforesaid, and then and there again took and distrained the said goods &c. as and for the same rent so pretended to have been due and payable as aforesaid, and not for any more or other or different rent or cause whatever, and then and there wrongfully and injuriously refused to return the same goods &c. to and withheld them from the plaintiff, under the second distress in this count mentioned, for a long time, to wit, six days then following, and then and there wrongfully converted and disposed of the same to their own use, although the plaintiff then and there requested the said defendants to deliver the said goods &c. to the plaintiff, to wit, at &c. whereby the plaintiff was and is greatly exposed and injured in his credit and circumstances, to wit, in the county aforesaid.

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At the trial before *Denman*, C. J. at the sittings at Westminster after last Michaelmas term, a verdict was found for the plaintiff, damages 10*l*.

In Hilary term following *Coltman* obtained a rule nisi for arresting the judgment (*a*); against which

*Platt* now shewed cause. That which appears upon the face of the count amounts to nothing more than this, that an illegal mode of distraining is resorted to; but it is unnecessary in this case to resort to the principles of pleading, for it has been already decided in *Branscomb v. Bridges* (*b*), that under circumstances such as are stated in this declaration case will lie. There is no *vi et armis* upon the face of the count.

*Coltman*, *contra*. The case of *Branscomb v. Bridges* is totally different from the present. In that case not only a wrongful entry, but also an excessive distress was proved. The action therefore might be maintained upon

(*a*) See *ante*, vol. i. 371.

(*b*) 2 D. & R. 256; 1 B. & C. 145.

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the excessive distress, which would alone give a right of action on the case under the statute of *Marlbridge*. *Branscomb v. Bridges* was in form an action on the case for an excessive distress, and it was there argued that the party having no colour of right for distraining, the form of the action should have been trespass. The Court held, that though trespass was maintainable, the plaintiff might waive the trespass and bring case.

If it be said that 11 *Geo. 2*, c. 19, s. 19, provides, that where a distress has been made for rent, a subsequent irregularity shall not constitute the distrainor a trespasser ab initio, but that the party aggrieved may recover damages in an action of trespass or on the case, at the election of the plaintiff; the answer is, that the election of the party is controlled by the general rules of law, and that the plaintiff must declare in trespass or in case, as trespass or case is adapted to the particular nature of his complaint; *Winterbourne v. Morgan (a)*. Here the declaration states that the defendants distrained the goods and chattels of the plaintiff for rent on the 31st of August, for and in respect of certain premises in the possession of the plaintiff, which goods and chattels were sufficient to have satisfied the rent and all charges, and that he continued in possession for a long space of time and then abandoned. Then comes that which forms the complaint; that afterwards the defendants, intending to injure the plaintiff, made a second distress, and sold the goods. This is a statement of an entry and seizure of goods unjustifiable in law. [*Littledale, J.*—The party not having been satisfied by the first distress, has a right to distrain a second time, subject to the liability of having an action brought against him for so doing.] If this be not contrary to law, then there is no complaint whatever. It has been held that trespass is the proper remedy for splitting the demand of rent, and taking two distresses. *Wallis v. Savill (b)*.

(a) 11 East, 395, 401.

(b) 2 Lutw. 1532.

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[*Parke J.* That is different from the case of a distress for the whole a second time, after abandoning the first distress. The landlord cannot lawfully split his rent.] In *Etherton v. Popplewell (a)*, the declaration was in trespass for breaking and entering the plaintiff's dwelling-house, and continuing there for three months, and expelling the plaintiff therefrom and detaining his goods in the house for the same space of time. It appeared that rent being due, the landlord distrained in the absence of the plaintiff and ejected his wife, who retained possession for him, and continued in possession of the house and goods until and for some time after the rent was paid. It was argued, that the only remedy was case, upon the statute of *Marlbridge*, and not trespass; that the original entry was lawful, and that what followed was only consequential to the first act, and done with a view of better securing the distress. Lord *Kenyon* said, "No answer can be given to the action of trespass for the excess of the defendant's conduct in the subsequent part of the transaction, in turning the plaintiff's wife out of possession which she held for her husband, and we cannot say that the defendant has not been guilty of a trespass upon this evidence." In *Winterbourne v. Morgan*, the declaration was in trespass for breaking and entering the plaintiff's dwelling-house and remaining there ten days, and then taking his goods and converting them to the defendant's use; and it appeared that the entry was made under a warrant of distress; but the defendants remained in possession eleven days before they began to remove the goods, and did not quit till the end of four days more, during which they removed the goods, which were afterwards sold in payment of the rent. It was objected, that the action should have been case. But it was held by the Court that the action was well brought in trespass. This case is stronger than that—*Le Blanc, J.* and *Bayley, J.* thought

(a) 1 East, 139.



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that the mere remaining on the premises after the time allowed by the law, was a substantive trespass. There is no grievance stated in this action for which the party can recover on a count in case: it is as if the declaration had contained nothing more than a simple allegation that the defendant had entered the house and made a great noise and disturbance and remained there five days, and had taken the plaintiff's goods and converted them to his own use. Every entry upon a man's land is a trespass, unless some cause be shewn which justifies it. Now what is the justifying cause which is shewn here? A cause entirely illegal. This is not one of the cases in which a party is justified in distraining a second time. If the first distress be abandoned on account of some wrongful act of the tenant, the landlord may make a new distress; but he cannot do so when by his own act he has abandoned the distress. If this be a count in case, it is bad, inasmuch as it discloses acts for which trespass only will lie: and if, on the other hand, the count is in trespass, then there is a misjoinder with the other counts in case, and the whole declaration is bad.

*Platt*, in reply. There is enough in this count to support case. The excessive distress here forms the subject of a substantive averment.

DENMAN, C. J.—There is a difference between the cases where the action *may* be brought in trespass and those where it *must* be in that form. I certainly think that trespass might have been brought in this case, but I do not think it follows that it must be so brought. *Branscomb v. Bridges* appears to me to be very much in point, and I am not satisfied with the arguments of Mr. *Coltman* upon that case. The decision goes upon very reasonable grounds. It was said, that it had been frequently decided, that trover will lie after a wrongful taking, and that that was a stronger case, for there the

goods were by the pleadings stated to have come lawfully into the defendant's possession. I think that in this case the plaintiff was at liberty to waive the force and arms, and bring his action in case, as the Court there held. This count is a count in case and not in trespass, and therefore there is no misjoinder.

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LITLEDALE, J.—The count says that the defendants made a sufficient distress and abandoned it; and afterwards wrongfully, injuriously and vexatiously made a second distress upon the plaintiff's goods for the same rent, and wrongfully and injuriously refused to return the goods, and withheld them from the plaintiff for six days, and then disposed of and converted them to their own use, whereby the plaintiff was injured in his credit and circumstances. This, I think, is a count in case. At the same time I think, that upon the facts disclosed in it an action of trespass would lie under the statute of 2 Geo. 2. By that statute, where a lawful distress is originally made, which is followed by a trespass, the action may be brought in case; so by analogy to the cases under that statute, case may be brought here. In cases of maliciously conspiring case may be maintained, although the overt acts charged as done in pursuance of the conspiracy might have been made the subject of several actions of trespass.

PARKE, J.—It seems to me also that the count may be supported as a count in case, though I had some doubt upon this part of the case. If the action had been brought in trespass it would have been maintainable, as in this count there is an allegation of matters for which trespass would lie. I would decide upon the ground of the principle, that a party may waive trespass and bring trover; for this is essentially a count in trover, stating the circumstances specially.

PATTESON, J.—I think that the ground upon which my

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brother *Parke* rests his opinion is correct. The end of the count is in a manner in trover. There is at the conclusion a statement of a conversion which may maintain the count as a count in case, which in form it is. I for some time thought the count was bad, but now I am clearly of opinion that it is not so.

Rule discharged (a).

(a) And see 1 Wms. Saund. 201, a.

T. G. EDWARDS and W. R. VIGERS, A. MACDONALD and J. LOWE, Assignees of MAXWELL HYSLOP, a Bankrupt, v. VERE and another.

A banker was not (before 3 & 4 Will. 4, c. .) liable to pay interest upon money deposited, although at the time of the deposit it had been declared that interest should not be payable upon a certain event which did not happen.

**ASSUMPSIT** for money lent, money paid, and upon an account stated. Plea, the general issue. At the trial of this cause at the adjourned sittings after Michaelmas term, in 1832, the following facts were admitted. In 1808, *Maxwell Hyslop* and *Weelwood Hyslop* became indebted to one *David Gordon*. In 1826 *David Gordon* instituted proceedings in Scotland and obtained a final judgment or decree for the amount of his debt, with interest. *David Gordon* became indebted to the defendants beyond the amount of the judgment recovered by him, and he assigned the judgment to them. *Maxwell Hyslop* and *William Hyslop* had some claims upon the Spanish government, in respect of which, in 1829, 10,000*l.* was awarded to them; 4100*l.*, part of this sum was on the 28th of October, 1829, deposited with the defendants, who are bankers, upon which occasion the two following memoranda were signed by them.

The first Memorandum.

“Memorandum.—That it is declared and agreed that a sum of 4100*l.* shall be placed and deposited by Messrs. *M. Hyslop* and *Thomas Grove Edwards* in the hands of Messrs. *Vere, Ward & Co.* for safe custody, on account of the said Messrs. *M. Hyslop* and *T. G. Edwards*; and from

the time such deposit shall be made and during its continuance *Vere, Ward & Co.* shall not pay any interest; and also that all interest shall cease and not be payable upon or in respect of the amount due from Messrs. *M. Hyslop* and *W. Hyslop* to Mr. *D. Gordon*, upon the judgment recovered against them, which has been assigned to *Vere, Ward & Co.* which, with interest, is now ascertained and settled at the sum of 4100*l.*; and such deposit or forbearance of interest shall not give *Vere, Ward & Co.* any right or claim to the sum so to be deposited, nor shall the said deposit or this memorandum prejudice or affect such right or claim in any manner, except as to the payment of interest as above."

The second Memorandum.

" Memorandum.—We the undersigned hereby declare and agree, that if Messrs. *M. Hyslop, T. G. Edwards, Thomas Kneder* the younger, and *Arthur Saltmarsh*, of London, merchants, or any two of them, of whom the said *M. Hyslop*, if then living, to be one, shall at any time hereafter consider and declare that the whole or any part of the sum of 4100*l.* which has been this day deposited in our hands, in the joint names of Messrs. *M. Hyslop* and *T. G. Edwards*, ought to be treated as a total or partial payment of a certain debt due and owing by Messrs. *M. Hyslop* and *W. Hyslop* to Mr. *D. Gordon*, and which has been assigned to us as a security for a debt due to us by the said *D. Gordon*, then and in such case the said sum of 4100*l.* as to the whole or so much as aforesaid shall be and be considered as an actual payment on account of the said debt due by the said *M. Hyslop* and *W. Hyslop*, from the time of making such deposit with us as aforesaid."

*M. Hyslop* subsequently became bankrupt, and the plaintiffs, *Vigers, Macdonald*, and *Lowe*, were duly appointed his assignees. On the 12th November, 1831, the plaintiffs demanded the 4100*l.* of the defendants, which they refused to pay. At the trial the plaintiffs claimed interest on the

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sum of 4100*l.* from the time the demand was made; this claim the learned judge refused to admit, and a verdict was found for 4100*l.* with permission to the plaintiffs to move to increase the damages, by adding the amount of interest claimed. In Hilary term last *Campbell*, S. G. obtained a rule nisi to increase the damages; against which


Interest, in  
what cases  
payable.

Sir *James Scarlett* and *Follett* now shewed cause. It is a general rule that in an action for money had and received, no interest can be recovered. Interest is allowed in four cases only; first, where there is a contract for the payment of money upon a certain day, as on bills of exchange and promissory notes: secondly, where there has been an express promise to pay interest: thirdly, where, from the course of dealing between the parties, it may be inferred that it was their intention: fourthly, where it can be proved that interest has been actually made of the money (*a*). The parties in this case never contemplated that the money should be at interest at all; it was either to satisfy the judgment, or to continue as a deposit for safe custody. It was a revocable deposit, and when the defendants refused to pay the money upon demand by the plaintiffs, it became money had and received to the use of the latter. It was the intention of the parties that any interest which might arise upon the deposit money, should be set off against the interest payable upon the judgment debt. Suppose that a man pays money into the hands of his bankers for a particular purpose, that such purpose had been frustrated, and the bankers had refused to pay over the money; he might maintain an action for money had and received; but how would he be entitled to interest?

*Campbell*, S. G. and *F. Kelly*, contra. The terms of the deposit are to be found in the first memorandum; from that it appears that as soon as the money ceased to be a deposit, interest became payable. The memorandum con-

(*a*) 1 Selwyn's N. P. 7th ed. 367.

tains these words, "and from the time such deposit shall be made, and during its continuance, *Vere, Ward & Co.* shall not pay any interest." The meaning of this clearly is, that no interest shall be payable so long as the deposit continues with the consent of the depository. It does not mean that interest shall not be paid so long as these defendants wrongfully retain it or until an action is brought against them. It is an implied promise on the part of the defendants to pay interest on the 4100*l.* when it ceases to be a deposit. There are various cases in which it has been determined, that where liberty is given by an agreement to do an act for a limited time, it amounts to a promise not to do it after the expiration of that time; *Randall v. Lynch* (a). [*Parke, J.* You must make out one of these propositions, either that the parties intended that the money deposited should at some time lie at interest as a loan, or else that the bankers should pay the money immediately on the deposit being revoked, with a penalty of interest in case of their neglect or refusal to pay. I do not think you can shew that they had either intention.] Where a day is fixed for the payment of the principal, interest is payable from that day, if the money be not then paid. Here, a day of payment of the principal was contemplated, which was to be fixed by the parties at a future time. And if, when that day is fixed, the money is not paid, the interest becomes payable until the final payment of the principal (b). There was an implied promise that interest should be payable from the time when the deposit was recalled. This case does not differ essentially from that where goods sold are to be paid for by bills payable at a time specified, in which case it has been held that if the bills be not given according to the agreement, the vendor may recover interest on the price in an action for goods sold, brought after the expiration of the time of credit; *Marshall v. Poole* (c). That must have been on the ground of the breach of contract, not because the parties contemplated the payment of interest

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(a) 2 Campb. 352, 356.

pl. 6, 19.

(b) Mann, N. P. Dig. *Interest*,

(c) 13 East, 98.


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under such circumstances. So here, though it should be considered that the parties did not expressly contemplate the payment of interest under the circumstances of this case, yet there has been a breach of contract on the part of the defendants, and they therefore must be bound to pay interest. The bankers have no doubt made interest of the money during the time that it was retained by them, and therefore on that ground also they are liable.

DENMAN, C. J.—I can very well conceive that if the deposit had been made with the clear intention that interest should not be payable only so long as a particular state of things continued, it would then be considered by the Court payable under every other state of circumstances. But it does not clearly appear to have been paid in with such an intention. When the parties agreed that interest should not be paid from the time such deposit should be made, and during its continuance, they may have meant to treat it as a deposit, so long as it should continue in the hands of the bankers. I therefore think that in this case the plaintiffs cannot demand interest.

LITLEDALE, J.—I also think that the interest is not demandable. The 4100*l.* was placed at the bank originally as a deposit, and was not intended to be drawn out in cheques. The bankers would make interest upon it, and therefore to prevent any doubt upon the question of interest, it is stipulated that interest shall not be paid so long as the deposit continues. As soon as the deposit was revoked it became money had and received, and applicable to the general purposes of the plaintiffs. I do not think it follows that a particular state of things is to arise, because the party has guarded against it under particular circumstances. With regard to the case of *Randall v. Lynch*, it is quite clear that the freighter was bound to pay the money. It resembles the case where a man takes a lease for 21 years and covenants to pay rent, and holds over after

the end of his term, he is bound to pay the rent for the time during which he holds over. It is only a continuing of the same holding. That is all that case meant. There is an implied undertaking to pay after his term is at an end, upon which the landlord may bring assumpsit. In *Marshall v. Poole* an agreement to pay interest was implied from the nature of the contract between the parties.

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PARKE, J.—I am also of opinion that the plaintiffs are not entitled to interest. The parties cannot be entitled to interest unless by the terms of the particular instrument. The rule as to interest has been well settled in the manner mentioned by Mr. *Follett*. The question here is, as to the meaning of the contract. In order to charge the defendants with interest it must be shewn that the parties either intended that the money should be considered as a loan bearing interest, or that they should be obliged to honour cheques under penalty of interest. Neither of these can be inferred from the instrument. It was clearly to be as a deposit without interest until the deposit was revoked. The parties never contemplated such a state of things as has arisen. A demand has been made, and after the demand I think it became money in the ordinary case lying in the bankers' hands without interest. The action of *Randall*, in the case of *Randall v. Lynch*, upon the covenant there, is analogous to an action by a landlord for rent where the tenant holds over.

PATTERSON, J.—The question turns entirely upon the construction of this agreement, because it is admitted not to be one of the ordinary cases. Looking at the instrument I cannot see any intention that interest should be paid. The money was placed with the bankers as a deposit, and during the continuance of the deposit it was agreed that no interest should be paid. I am not prepared to say that the deposit was at an end until the money was paid off altogether. It seems to me to be a mere deposit in the



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hands of a banker. This is the common case of money had and received.

Rule discharged.

The KING v. The MAYOR and ALDERMEN of LONDON.


Where the right of election of an alderman is by custom in the citizens, but the court of aldermen has the power of rejecting the party returned to them as elected, it is not inconsistent to return to a mandamus to admit to the office of alderman, that the prosecutor was elected by the citizens according to the custom, but was rejected by the court of aldermen, and so was not duly elected.

IN Hilary term last, a mandamus, returnable 23d January, issued to the mayor and aldermen of London, to admit and swear *Michael Scales* into the place and office of alderman of the ward of Portsoken, in the city of London.


To this writ the mayor and aldermen returned: that the city of London is an ancient city, and that the citizens and freemen have been and are a body corporate and politic by divers names of incorporation, and now by the name of the mayor and commonalty and citizens of the city of London: that from time whereof &c. there of right have been and still are divers wards, and amongst others the said ward of Portsoken, and divers freemen and citizens who have been called aldermen of the said city: that the office of alderman has been and still is a public office and of great trust and pre-eminence within the city, touching the rule and government thereof: that from time whereof &c. there of right hath been and still ought to be within the city a court of record, called the court of mayor and aldermen of the city of London, holden in the Guildhall, before the mayor or his locum-tenens, and the aldermen, or at least twelve of them, when it seemed meet and necessary to the mayor upon due notice, for, amongst other things, consulting about and transacting lawful and necessary affairs concerning the good government of the city: that from time whereof &c. certain assemblies or courts, called ward-mote courts, have been of right holden from time to time and on divers days in each of the said wards, for, amongst other things, the election of divers persons into divers offices and places, and amongst others into the office or place

of alderman of the city, by virtue of precepts issued for such elections, to which precepts returns have been and ought to have been made and still ought to be made to the said court of mayor and aldermen : that the said court, according to the custom of the city from time whereof &c. has had, and ought to have had, and still ought to have the cognizance, jurisdiction and authority, of examining, hearing, determining, and adjudging of and concerning the election and return of any person elected into any place or office within the city at any wardmote court, whenever the merits of such election or return have been brought into question by the petition of any person interested therein, to the said court of mayor and aldermen, and also of examining whether or not any person so returned to the said court as an alderman of any ward is, according to the discretion and sound consciences of the mayor and aldermen, a fit and proper person and duly qualified in that behalf upon petition (as above :)—that according to the custom it was necessary that a person to be admitted and sworn into the place and office of alderman, should be a fit and sufficient citizen and freeman of the city, and also a fit and proper person to support the dignity and discharge the duties of the office of an alderman and the honour and charge of the city, according to the discretion and sound consciences of the mayor and aldermen : that according to custom there should be within the city a court of common council holden before the mayor or his locum-tenens, and the aldermen and the commons of the city duly elected, according to the custom assembled upon reasonable summons, who have been the common council of the city, to consult upon matters proposed in common council concerning the city, and to declare the assent and dissent as well for themselves as for the rest of the citizens and commonalty of the city, and who have a right to make reasonable ordinances, acts and bye-laws, for the better government, order and regulation of the city : that by ancient custom, and by virtue of a bye-law duly made in the reign of Queen *Anne*, reviving the

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ancient custom, when any ward became vacant and destitute of an alderman, the inhabitants of the ward having a right to vote in the election of an alderman might elect one able and sufficient citizen and freeman, not being an alderman, to be returned to the court of lord mayor and aldermen; which person so elected should be by them admitted and sworn well and truly to execute the office of alderman: that a court of wardmote was holden in and for the ward of Portsoken, on 5th December, 1831, and by adjournment on subsequent days, before Sir *John Key*, bart. then mayor of the city, by virtue of a precept for that purpose duly issued for the election of an alderman, vice Sir *James Shaw* resigned, the said *M. Scales*, who had been returned to the court of lord mayor and aldermen to be alderman of the said ward, having been adjudged not to be a fit and proper person to support the dignity and discharge the duties of alderman; "at which court of wardmote, divers persons being then present voted for the said *M. Scales*, as and for such alderman, and the said *M. Scales*, by reason thereof, claimed to be duly elected into the office or place of alderman so vacant as aforesaid:" that a return was duly made to the precept on 3d January, 1832, by which it was stated, that so far as the majority of votes or polls was concerned, the said *M. Scales* was elected alderman of the said ward: that a petition was duly presented on the said 3d January, 1832, against the admission and swearing in of the said *M. Scales*, to the effect that the said *M. Scales* was not eligible, and was not a fit and proper person to support the dignity and discharge the duties of alderman, nor a fit and proper person to be admitted and sworn into the said place or office, and that he had not been duly elected; whereupon the court of mayor and aldermen took the said petition into consideration, and having heard the petitioner, in the hearing and presence of the said *M. Scales*, and also having heard the said *M. Scales* touching the merits of the said election, and the qualification and fitness of the said *M. Scales*

to be such alderman, and having heard all that was alleged, as well by and on behalf of the said petitioners, as of the said *M. Scales*, did, according to the custom, examine, determine and adjudge of and concerning the merits of the said petition, and of and concerning the qualification and fitness of the said *M. Scales* to be admitted and sworn into the said office of alderman of the ward of Portsoken, and due deliberation being thereupon had, the said court of mayor and aldermen, according to their discretion and sound consciences, determined that the said *M. Scales* was not at the time of the said supposed election, nor at any time since, a person fit and proper to support the dignity and discharge the duties of the said place and office of an alderman of the city, nor a fit and proper person to entitle him to be admitted and sworn into the place and office of alderman of the ward of Portsoken: That the court of mayor and aldermen did further adjudge and determine, that the said *M. Scales* was not, and that in truth and in fact the said *M. Scales* was not, duly elected to be alderman of the said ward of Portsoken, at the election mentioned in the return to the said precept, nor eligible to be a candidate at the said election: That for the several causes aforesaid, and each of them respectively, the said *M. Scales* is not a fit and proper person to entitle him to be admitted and sworn into the place and office of alderman of the ward of Portsoken in the said writ mentioned, and according to the custom of the said city: That the said *M. Scales* was not duly elected into the place and office of alderman of the ward of Portsoken, in the said city, as by the said writ is supposed and suggested.

That for these reasons and causes we the said mayor and aldermen cannot admit and swear, nor ought we to admit and swear, the said *M. Scales* into the said place and office of alderman of the ward of Portsoken aforesaid, as by the said writ we are commanded.

(Signed by Sir *Peter Laurie*, lord mayor, and  
by twenty aldermen.)

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Sir *J. Scarlett* now moved to quash the return, and for a peremptory mandamus. The first part of the return says, that the right of election of an alderman is in the citizens at their wardmote courts, with a right of rejection, by the court of aldermen. It then states, that *M. Scales* was elected by a majority of the citizens present at a wardmote court, and was rejected by the court of mayor and aldermen; and at the end of the return it is certified that *M. Scales* was not duly elected into the place and office of alderman. The latter fact is therefore inconsistent with the former. It is not intended to be denied that several returns may be made to a mandamus; but the several returns must not be inconsistent, as is shown by *The Queen v. Mayor and Aldermen of Norwich* (a). That was a mandamus to admit one *D.* to the office of alderman of Norwich, and the return stated, that the custom was, that the aldermen of Norwich should be elected and rejected (onerarentur et exonerarentur) as the aldermen of London; and that in London if a person be elected alderman by the ward, the court of aldermen may refuse him, and that *D.* was elected by the ward, and was refused by the mayor and aldermen because &c.; and then at the end of the return, they returned that he was not elected. It was urged, that the cause assigned made the election void, but the Court granted a peremptory mandamus, because the return was repugnant and contradictory. In this case the return contains a similar defect. [*Parke, J.* There is no inconsistency in saying first, that a party was elected, and afterwards that he was not duly elected. This point was fully considered in the case of Alderman *Winchester* (b).] Here the return sets out that the majority had a right to elect, and then it states that *Scales* was elected by a majority. This is a special mode of returning that he was duly elected, and therefore this is inconsistent with the return at the end that he was not duly elected. [*Denman, C. J.* There is a distinct return that he was not duly elected,

(a) 2 *Ld. Raym.* 1244.

(b) *Rex v. Mayor, &c. of Lon-*

*don*, 4 *Mann. and Ryl.* 36; 9

*B. & C.* 1.

and if you do not meet it, we must dispose of the case.] To the former mandamus, it was returned that he was not duly elected, yet the Court held the return not good. [*Denman*, C. J. It was not so clearly stated.] In the former part of the return it is stated, that there was a good election.

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*Per Curiam*.—The return is sufficient.

Rule refused.

The MAYOR, BAILIFFS and BURGESSES of the Borough  
of LEICESTER, v. THOMAS BURGESS.

**CASE.**—The declaration states, that Leicester is and has been, from time whereof &c., an ancient borough, in which from time whereof &c. until 41 *Eliz.* there was a body politic and corporate known by divers names of incorporation; and that Queen *Elizabeth* constituted and enacted that the burgesses of the borough and their successors should be a body politic and corporate by the name of “mayor, bailiffs, and burgesses of the borough of Leicester.” The third count states that there has been from time whereof &c. an ancient custom in the borough, that no person not being a burgess, or the widow of a burgess of the borough aforesaid, shall carry on the trade of an alehouse-keeper within the limits of the borough, yet the defendant well knowing the premises and not being a burgess of the borough, nor having any lawful right or excuse in this behalf, but contriving to injure the plaintiffs, on 30 March, 1831, and on &c. carried on the trade of an alehouse-keeper within the limits of the borough, contrary to the custom, and against the will of the plaintiffs. The 4th and 5th counts stated the custom as to the *persons* to be licensed differently. In other counts similar customs are alleged, as to persons carrying on the trade of a victualler, or selling ale or beer by retail, or occupying a house for the purpose of selling ale or beer by retail, or carrying on any trade by retail.

The Beer Act (1 W. 4, c. 64,) does not abrogate a custom in a borough that no one shall sell beer within the borough except a freeman licensed by the mayor and aldermen.

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Plea: first, not guilty: secondly, *actio non*, because after the tenth day of October, 1830, mentioned in a certain act of parliament, made 1 Will. 4, intituled, "An Act to permit the general sale of Beer and Cyder, by retail in England," and before either of the said times when &c. that is to say, on &c., at &c., the defendant then and there being a householder, holding and occupying the house in the said declaration mentioned to have been occupied by him, and being then and there assessed to the poor-rates in the parish in which the house was situate, and in which he was licensed to sell beer by retail as hereinafter mentioned, and not then and there being a sheriff's officer or officer executing the legal process of any court of justice, under and by virtue and in pursuance of the provisions of the said last-mentioned act of parliament, duly applied for and obtained from certain persons, to wit, *J. T.* and *G. F.* the said *G. F.* then and there being supervisor of excise, and the said *J. T.* then and there being collector of excise for the district and collection within which the house after mentioned was and is situate, a licence under the hands and seals of the said *J. T.* and *G. F.* to sell beer, ale, and porter by retail, in the said district, in a certain house specified in the said licence, being a house situate within the limits of the said borough and district and collection, and being the house in the declaration and in this plea mentioned to have been occupied by the defendant, the said district collection and borough not being within the limits of the chief office of excise in London; and that at the said times when &c. the defendant by virtue of the said licence did sell beer, ale, and porter by retail in the said house, and not elsewhere in the said borough, and for that purpose, and in so doing, but not otherwise, or elsewhere, did carry on the said trade of an alehouse-keeper and victualler, and then and there occupied the said house for the purpose of selling beer, ale, and porter, by retail therein, and therein carried on the trade of selling beer, ale, and porter, as he lawfully might, for the cause aforesaid. General demurrer, and joinder.

*Amos* in support of the demurrer. The question raised by these pleadings is, whether the act of 1 *Will.* 4, c. 64, which authorizes the general sale of beer by retail, supersedes the local customs of particular places. The first section, which makes it lawful for any person who shall under the provisions of that act obtain a licence to sell beer, will be relied on by the other side. It will be necessary, in order to see what was the intention of the legislature, to refer to the preamble of the act, which is said by Lord *Coke* to be a window which lets in light upon the act, and is a key to open its meaning. The preamble states that "it is expedient for the better supplying the public with beer in England, to give greater facilities for the sale thereof, than are at present afforded by licences to keepers of inns, alehouses, and victualling houses." The preamble shows that the object of the legislature was to alter generally the *licensing* system throughout England. If it had been intended to supersede local customs, the preamble would have been differently penned, and the local customs intended to be abrogated would have been alluded to. Thus in 3 *Geo.* 3, c. 8, an act to enable mariners and soldiers to exercise trades in cities, the preamble expressly mentions the customs intended to be superseded. The subsequent statutes for the like purpose, ending with 56 *Geo.* 3, c. 67, also specially advert, in the preamble, to the customs intended to be repealed. The first section of the act under consideration, after saying that it shall be lawful for any person having a licence, to sell beer, concludes in this way, "any thing in any act or acts heretofore made, or in force at the time of the passing of this act to the contrary, in any wise notwithstanding." The former *acts* are thus expressly mentioned, but there is no allusion to any *custom*. Had it been intended to supersede all local customs, as to the retailing of beer, the words of the section would have been "any thing in any act or acts, *custom or customs*," &c. The act only takes away the restrictions of former *statutes*

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[*Parke J.* It merely puts the person obtaining licences under this act upon the same footing as those who were licensed under the former acts.] In *Coke* upon *Littleton*, (a) it is said, "There is also a diversity between an act of parliament in the negative and in the affirmative; for an affirmative act doth not take away a custom, as the statutes of wills of 32 & 34 *Hen.* 8. do not take away a custom to devise lands, as it hath been often adjudged." So in *Comyns's Digest* (b) it was laid down that affirmative words in an act of parliament do not take away a custom. The object of the present act has been gained in giving greater facilities towards obtaining licences for the sale of beer. The Court had previously shewn great reluctance to compel magistrates to grant licences; *Giles's case* (c), *Rex v. Justices of Surrey* (d). In *Simpson v. Moss* (e), it was said that the act for the licensing of hawkers did not enable a person licensed to trade in cities or boroughs where there was a custom or bye-law prohibiting them from so doing. There is no good reason for abolishing the custom of cities as to the retailing of beer, and allowing them to retain every other custom. The object of the legislature was merely to put the trade of selling beer upon the same footing as other trades.

*Campbell, S. G. contra.* The defendant relies not only upon the first section of the act, but upon the second section, and still more upon the 29th. This is a question of considerable importance, as the decision of the Court will have a very extensive effect. By the act licences may be obtained by all his Majesty's subjects. The statute enumerates all the persons qualified to hold licences; and specifies the exceptions. This being the case, the court will not engraft upon the act exceptions not contained in it. The act contains no expression which intimates that before

(a) 115 a. 1 Tho. Co. Litt. 30.

(b) *Parliament* (R. 24.)

(c) 2 Str. 881.

(d) 2 Dowl. & Ryl. Mag. Ca. 435.

(e) 2 B. & Adol. 543.

a party can obtain a licence, he must be a freeman of a borough. The preamble has been referred to in the course of the argument on the other side, which, it has been said, affords the means of construing the act. The preamble, however, is not to be resorted to, except where the meaning of the statute is doubtful, not where the enacting part of the act is clear, plain, and unequivocal; *Rex v. Pierce* (a). The title of the act, which is to be taken as part of it, according to *Dr. Free's case* (b), shews what was the intention of the legislature in framing this statute. The title is "An act to permit the general sale of beer in *England*." The construction attempted to be put on the act would in fact be in restraint of the object of the act. That object was to have a free trade in beer. Why are not the inhabitants of the borough of Leicester to have good and cheap beer as well as the rest of his Majesty's subjects? If no one who are not free of the borough can keep a beer shop, Leicester will be excluded from the operation of the act. By putting a high price upon the freedom of the borough, the corporation would have it in their power to prevent the sale of beer. For this Court will not issue a mandamus compelling magistrates to grant licences to any person. The allusion to the customs of boroughs, in the act relating to mariners and soldiers, referred to on the other side, does not afford conclusive argument in favour of the plaintiff. The only object of that act was to enable soldiers and sailors to trade in boroughs and cities. The customs of those boroughs must therefore of necessity be mentioned. By the 29th section of the act, the privileges of the two Universities of Oxford and Cambridge, and of the Vintners' Company in London, are saved. According to the argument on the other side, this clause was unnecessary. If the customs of particular boroughs had been intended to be saved, there would have been an exception in favour of them. As the act contains one exception, all

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(a) *Free v. Burgoyne*, 8 Dowl. & Ryl. 179; 5 Barn. & Cressw. 400.

(b) 3 M. & S. 66.

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other cases of the same kind are to be within the general provisions of the act, *Lord Zouch v. Moore* (a). *Simpson v. Moss*, is not applicable. The act which authorizes the licensing of hawkers, is in restraint of the common law; as any one before that act might have travelled from town to town, and sold goods. This is the case of an enabling statute; which must receive a different construction from the Hawkers' Act, which is a restraining statute,

*Amos*, in reply. Had the 29th section excepted one particular borough from the operation of the act, it might reasonably have been inferred that it was the intention of the legislature to include all other boroughs within its provisions. The 29th section, however, has reference only to the procuring of the licence, and not to the place in which the licence is to be used. The clause was copied from 34 Geo. 3, c. 61, and is precisely the same as the 36th section of that act. The title is perfectly consistent with the preamble, and with the object of the act, which was to give greater facility to licensing. The title, however, as it is not, like the body of the act, read three times in the house, forms no part of the statute; *Dwarris on Statutes* (b). The exceptions in the second section relate to the obtaining of licences, and do not affect those who have already obtained them.

DENMAN, C. J.—Upon looking at the act of parliament, I at first thought it was meant to be general, and that the intention of the legislature was, that every householder, upon obtaining a licence from the Excise, should be at liberty to sell beer by retail, although they were before restricted by local customs. This view appeared to be confirmed by the 29th section. Upon consideration I have changed my opinion. Local customs, according to the authorities cited by Mr. *Amos*, are not controlled by general words in a statute in the affirmative; and the exceptions in the 29th section

(a) 2 Roll. Rep. 274, 280.

(b) P. 653.

are not of the same kind as the customs of boroughs. The densuror must therefore prevail.

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LITTLEDALE, J.—I am also of opinion that the densuror should prevail. The object of the act was to give the public at large a power of selling beer. Under the former acts no power was given to the magistrates to grant licences to sell beer in places where a local custom as to the granting of licences existed. Therefore I think that this act, which merely extends the class of persons qualified to demand a licence, does not empower the granting of licences to sell within a borough where a local custom as to the retailing of beer exists. The 29th section merely saves to the Universities and the Vintners' Company their privileges as to the granting of licences, and has nothing to do with a local custom, that any person not being a freeman shall not sell beer within a borough. In some cities the corporation has a power of granting licences to freemen. This act does not affect their power to grant licences. I think that *Simpson v. Moss* is distinguishable from the present case, on the ground stated in the argument.

PARKE, J.—I am clearly of the same opinion, and I entertained this opinion from the first moment that I read this case. Upon looking at the title, the preamble and the whole of the act, it appears that the object of the act was to alter the licensing system, and nothing more. The preamble says, it is expedient, for the better supplying the public with beer in England, to give greater facilities for the sale thereof than are at present afforded to keepers of inns, alehouses and victualling houses. The first section then authorizes any person who shall obtain a licence for that purpose, under the provisions of the act, to sell beer by retail in any part of England, in any house specified in such licence. The title of the act is perfectly consistent with the preamble, and the enacting part, of the statute. The act only intended to do away with the restriction im-

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posed by acts of parliament upon the licensing system, and not to interfere with the local customs of boroughs as to the retailing of beer. Nor does the circumstance that the rights of certain bodies are excepted in the 29th section from the operation of the act, make any difference as to the construction of it in this case. For the powers of the Universities and of the Vintners' Company are not ejusdem generis with the privileges of particular boroughs.

PATTESON, J.—I do not think that the act affects local customs of this description. The only circumstance which made me doubt at all, was the 29th section. Had it been intended to abrogate these customs, something would have been said about them.

Judgment for the plaintiffs.

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The power of the commissioners under the first Tower Hamlets' Court of Requests Act, (23 Geo. 2, c. 30,) to commit debtors in execution to the House of Correction, was taken away by the General Gaol Act, (4 Geo. 4, c. 64,) and a classification of prisoners in pursuance thereof; and it is not restored by the last Tower Hamlets' Court of Requests Act, (2 Will. 4, c. lxxv.).

A RULE nisi for a mandamus calling upon the Governor of the House of Correction to receive *James Grover*, a prisoner for debt, committed to that prison by the Court of Requests for the Tower Hamlets, having been obtained by *J. L. Adolphus*, it was agreed between the parties, with the assent of the Court, that the propriety of the commitment should be argued before the Court, upon shewing cause upon the following special case:

By the 23 Geo. 2, c. 30, certain commissioners constituted "The Court of Requests for the Tower Hamlets," were empowered to entertain and decide upon suits brought against any person residing or trading within the district, for debts not amounting to 40s.; and in case of refusal to appear before the commissioners, by a person duly summoned, or the non-performance of an order made

by them, they were empowered to commit the offender to the common gaol or House of Correction for Middlesex, or to the gaol for the liberty of the Tower of London. If any person should contemptuously insult any of the commissioners, during their sitting in the Court, the beadles of the Court were authorized, by order of the sitting commissioners, to take the offender and carry him before a justice or justices of the peace, to answer such insult, and upon proof the justices were to proceed to punish by fine, not exceeding 20s., to be immediately paid to the justices; and in default of payment, the justices were empowered, by warrant, to commit to the common gaol or House of Correction for Middlesex, or to the gaol for the liberty, according as the offence was committed in the county or liberty.

This act was amended and explained by 19 *Geo. 3*, c. 68, but the alterations do not affect the present question.


By 2 *Will. 4*, c. lxxv. to amend the above acts, after reciting them, it was enacted, "that all the enactments, powers and provisions therein respectively contained, should, so far as the same were not repealed, altered, or otherwise provided for, be in full force and effect, and should be applicable to all matters and persons to whom that act did or should extend or be applicable, in the same manner, and as fully and effectually, as if the same had been repealed and re-enacted in that act." The jurisdiction of the Court is by this act extended to debts not exceeding 5*l*.

By section 18, if any person duly summoned as a witness in any suit before the Court, shall refuse to appear or to give evidence before the commissioners, and oath is made by the party on whose behalf he was summoned, that such person's evidence is necessary to his cause, he shall forfeit a sum not exceeding 40s.; and in case of nonpayment the commissioners are authorized to cause him to be apprehended and committed to the House of Correction, or to the common gaol of Middlesex.

By section 22, in case of contemptuous and wilful insult or abuse of any of the sitting commissioners, or obstruc-

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tions of the proceedings of the Court by any person, the beadle is authorized, by order of the commissioners, to take such offender into custody, and the commissioners are to examine touching such misbehaviour; and upon its being proved, may impose a fine, which, if not immediately paid, may be levied by distress; and in case sufficient distress cannot be found, the commissioners are empowered to commit the offender to the common gaol or House of Correction for Middlesex.

By section 27 it is enacted, that in any cause, action or case, where the commissioners shall have made an order or decree for the payment of money, it shall be lawful for the commissioners, in case of default or failure of such payment at the time directed, to award execution; in the first instance, against the goods of the party against whom such order or decree shall have been made; and if the party have not any or not sufficient goods or chattels whereon to make levy, then the commissioners are empowered to award execution against the body of the party for the whole or so much of the money and costs decreed or adjudged as shall then remain unsatisfied; and thereupon the proper officer of the court is authorized, at the prayer of the party prosecuting, to issue a precept to a beadle of the court, who is directed and empowered to take such party, who shall remain in custody until he shall perform and obey such order, decree or judgment.

Section 29 limits the time during which persons may be continued in custody upon the order of the commissioners, which is varied according to the amount of the debt recovered; and all gaolers and keepers of prisons are directed to discharge such persons accordingly.

By section 60, in case of penalties, forfeitures and fines, under any of the several acts authorized to be inflicted or imposed, (the manner of levying and recovering which is not otherwise particularly directed,) a justice or justices of Middlesex may, upon proof, issue a distress-warrant to levy the same; and if no goods are found, or insufficient, or if

upon confession of the offender it be found that he has not sufficient goods, then, without warrant of distress, commit the offender to the common gaol of Middlesex, or to any house of correction within the same.

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On the 9th November, 1832, the commissioners of the Court of Requests made an order in a suit depending in that court, addressed to the beadle of the court, or any one or more of them, and to the keeper of the House of Correction for Middlesex, which recited that an execution had been awarded and issued against the goods of *James Grover*, and it had been returned that he had not sufficient goods whereon to levy the debts and costs therein, and that the same remained unsatisfied, whereby the beadle, or any one or more of them, were required to take the body of *Grover*, and convey him to the said prison, if residing within the said county, and deliver him to the keeper thereof, together with that warrant. And the said keeper was thereby required to detain the said *Grover* in the said prison for twenty days, unless he should sooner pay 1*l.* 9*s.* 7*d.* and 3*s.* 6*d.* costs, adjudged and ordered by the said court, to *Thomas Spooner*, or be sooner discharged by due course of law.

By virtue of this warrant, *Gregory*, a beadle of the court, took *Grover* and conveyed him to the House of Correction for Middlesex, where he produced the warrant to a deputy keeper, acting for the Governor, but the keeper refused to receive the prisoner, alleging, as the fact was, that he had been directed by the Governor not to admit debtors committed by the Court of Requests, in consequence of an order of justices at the quarter sessions for the said county, held in the preceding July.

By the order referred to, (and which was in fact served upon one of the clerks of the said court, in the same month of July,) it was ordered by the Court of Quarter Sessions, that the Governor of the House of Correction at Cold Bath Fields, and the keeper of the New Prison, Clerkenwell, should in future severally refuse to receive into their



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custody all debtors committed, or to be committed, by the Court of Requests for the Tower Hamlets, or by any of the commissioners, or any officers or officer of the said court: and all and every persons and person committed or to be committed by the said court or commissioners, for not performing orders, decrees or judgments, made and set down, or to be made and set down by the said court or commissioners, for or concerning debts over which the said court or commissioners has or have cognizance. And it was also ordered, that a copy of this order should be transmitted to the said commissioners, and be served on the said governor and keeper.

The warrant of the commissioners, and the proceedings thereupon, touching the said *Grover*, were not irregular, if the commissioners had power to commit him to the House of Correction for Middlesex.

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By 4 Geo. 4, c. 64, (General Gaol Act,) after reciting in section 6, *inter alia*, that due classification is essential to the discipline of a prison, and that the laws directing the separation, superintendence, employment and instruction, require to be amended and enlarged, and to be more uniformly and strictly carried into effect, it is enacted that there shall be maintained at the expense of every county in England and Wales, one common gaol, and at the expense of every county not divided into ridings and divisions, at least one house of correction, and that the regulations and provisions contained in that act shall extend in manner thereafter mentioned, to every such gaol and house of correction, and to the several gaols and houses of correction in the cities of London and Westminster.

By section 4 it is enacted, that the Court of Quarter Sessions shall proceed in carrying this act into effect, and shall by orders ascertain and declare to what class or classes of prisoners every such gaol or house of correction, or any part or parts of any of them respectively shall be applicable, and that a copy of such order shall be served upon the keeper of every such gaol, &c. within the county; and that

after the making of such order, and such class of prisoners as shall be specified in such order, and no other, shall be committed to or detained in any such gaol, house, &c. or any part of any of them respectively. "And all persons not coming within the class or description of prisoners who may lawfully be committed to or detained in such prison as shall be appointed by the justices for the confinement of one or more class or classes of prisoners, may be removed to the gaol or house of correction of the county, riding or division; and every such gaol or house of correction shall be deemed the legal gaol, prison, or place of confinement of every person respectively committed to the same, in pursuance of such order as aforesaid, any thing in any act or acts, or any law, custom or usage, to the contrary notwithstanding; provided always, that no classification of prisoners shall be made in any house of correction, appropriated to the reception of any particular class or classes of prisoners, which shall be in any way inconsistent with, or contrary to, the classification directed by this act."

By section 5, when the house of correction and common gaol form but one building, or are united or contiguous to each other, provisions are made for the dividing into compartments for the purposes of separation and classification, and for the directing what compartments shall be appropriated for particular classes of prisoners, and enacts, "that persons committed to or detained in the respective parts and divisions to be ascertained and appropriated to them respectively applicable, should be deemed and held to be in legal custody; provided, that prisoners for debt may be removed to, and shall always be confined in the part or parts of such buildings, or united or contiguous buildings, which shall be so ascertained or be appropriated as and for the gaol of the county or division."

By section 10, after reciting that it was fit and proper to secure an uniformity of practice in the management of the several prisons to which that act should extend, it is enacted, that the following rules and regulations shall be

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observed and carried into effect in every gaol or house of correction, as far as such rules may be applicable or can be applied to the particular description or class of prisoners confined in such prison; and by the 6th rule it is directed that care shall be taken that prisoners of the following classes do not intermix with each other.

In GAOLS: first, *debtors* and persons confined for contempt of Court on civil process; second, prisoners convicted of felony; third, persons convicted of misdemeanors; fourth, prisoners committed on charge or suspicion of felony; fifth, prisoners committed on charge or suspicion of misdemeanors or for want of sureties.

In HOUSES OF CORRECTION: the same classes are mentioned, and in the same order, except that the class of *debtors* &c., and also prisoners committed for want of sureties, are omitted, and vagrants are added as the 5th class.

It is also by that section directed that prisoners intended to be examined as witnesses on behalf of the crown, shall be kept separate in all gaols and houses of correction. By section 46, justices are required to adopt plans for affording the most effectual means for, amongst other things, the *classification* of prisoners, and that distinct wards and airy cells shall be provided for prisoners of the several classes thereafter named; and then, after declaring that the primary rule is to be that the prisoners of the two sexes shall be separate, it is directed that provision shall be made for the separation of prisoners into the following classes. Then follows the same division as is contained in section 10, and at the end is added "and such further means of *classification* shall be adopted as the justices shall seem conducive to good order and discipline."

Removal of  
prisoners.

By section 57 provision is made for the temporary removal of prisoners from any house of correction in case the parties deem it necessary, and for the removal of the *debtors* and any prisoners from any *common gaol*.

The average number of prisoners confined in the Middlesex House of Correction during twelve months, ending 24th

November, 1833, has been upwards of 1100, which is more than the prison can conveniently contain. The admission of debtors therein is objected to on the ground that it cannot legally be done; that it would be highly inconvenient, and would materially interfere with such classification as is prescribed by 4 Geo. 4, c. 64, and would be otherwise detrimental to the discipline of the prison, and further, that no provision exists therein at present for the reception of debtors; and it is alleged that until Whitecross Street prison was built, all debtors committed by the county clerk of the county of Middlesex (which county court is regulated by 23 Geo. 2, c. 33,) were committed to and received into Newgate, and have since the erection of the prison in Whitecross Street, Cripplegate, been committed to, and received into, that prison.

By 52 Geo. 3, cap. ccix., after reciting that criminals and prisoners under civil process had been confined in the same prisons, and that it was desirable that prisoners under civil process should not be confined in the same gaol with prisoners for felony and other offences, the mayor, aldermen, and common council are authorized to erect a new prison to be divided into ten separate parts, one of the parts to be appropriated for the confinement of prisoners confined under civil process in the custody of the sheriff of Middlesex, which prison when erected shall be called "The Debtors' Prison for London and Middlesex."


Section 50 provides for the removal of prisoners under civil process confined in Newgate gaol, the then two comptons, and the prison of Ludgate, to the new gaol.

Section 56 declares, that thereafter the gaol of Newgate shall be appropriated exclusively to felons and to such other prisoners as are not by that act authorized to be confined in the new prison.

Section 57 declares, that prisoners for contempt of Court for not paying any sum of money or costs, shall be deemed, for the purposes of that act, to be prisoners under civil process.

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Section 58 is as follows: "Provided always, and be it further enacted, that nothing in this act contained shall extend to or be construed to extend to infringe, defeat, or affect the power or authority of any Court, judge, justice, commissioners of bankrupt, or others, to commit any person whatsoever to the said gaol of Newgate, or to any other gaol or prison."

The said prison was erected pursuant to the statute, and is in Whitecross Street, Cripplegate.

From 1804 until 1828, debtors taken in execution under warrants or orders of the said Court of Requests, were taken to and received and detained in the House of Correction for Middlesex. In October, 1828, the commissioners received the following letter from and signed by the chairman of the visiting justices for the said county.

"Gentlemen—As the alteration of the rules for the better regulation of the house of correction may probably interfere with the comfort of those poor debtors whom you commit to this prison, the visiting justices request that they may in future be committed to the New Prison, Clerkenwell."

From thenceforth such prisoners were taken to and received in the new prison until the making of the said order of sessions in July, 1832.


The question for the opinion of this Court is, whether the Governor of the House of Correction for the county of Middlesex is bound to receive into the said prison debtors in execution committed to the said house of correction by warrant or order from the Court of Requests for the Tower Hamlets?

*J. L. Adolphus* for the prosecution. By 23 Geo. 2, and 19 Geo. 3, power is given to this Court of Requests, which acts for a large and populous district, to commit prisoners to certain prisons, and, amongst others, to the House of Correction for Middlesex, and to the county gaol. The 2 W. 4, cap. lxxv., after reciting the former acts, declares that

all the enactments, powers, and provisoes in those acts contained, so far as they are not repealed, altered, or otherwise provided for, shall be in full force and effect, and shall extend and apply to all matters and persons to whom this act shall extend and apply, as if the same had been repealed and re-enacted. Then the question appears to be, whether the powers which were given by the former statutes have been in any way, either by the act of 2 Will. 4, or by any other provision or circumstance whatever, repealed or altered or otherwise provided for. These powers must have been repealed, altered or provided for in a very distinct or forcible manner, after the Court has for so long a time enjoyed them under the act of parliament, but nothing of this kind is to be found stated in the case. The clause in 2 Will. 4, cap. lxx., under which this party was committed to prison, was a clause only introduced into that statute for the purpose of providing that the body should not be taken in execution, except where there was not enough property to satisfy the debt. At the end it is provided, that if sufficient goods cannot be found, the party shall be taken and detained in custody, without saying where. Unless the place of custody appears in some other part of this act, it must be taken that the custody is that which is mentioned in the former act, and the clause in the former statute, which gave more specific directions upon this point, must be considered as imported into this act.

The statute which will chiefly be relied upon by the defendants as repealing the powers which the Court of Requests has enjoyed, will probably be that of 6 Geo. 4, c. 64, which provides, that there shall be in each county one common gaol, and at least one house of correction, all which are placed under the jurisdiction of the justices at quarter sessions; and also provides (sect. 4) for a classification, by the justices, of prisoners in each prison, with a proviso "that no classification of prisoners shall be made in any house of correction appropriated to the reception of any particular class or classes of prisoners, which shall be in

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any way inconsistent with or contrary to the classification directed by this act." To this it may perhaps be objected that it does not appear upon the case that any particular classification has been made by the justices, of the prisoners to be confined in this house of correction, and that such classification is made by this act a condition precedent to the exclusion of a prisoner of any particular class, or making any alteration in the state of things which had formerly existed. This objection, however, it is not intended to press, except so far as it may bear upon another view of the case, which is, that the power given by this act to justices is merely a power to *arrange* the prisoners, who might under the former law be committed to the different prisons, and not a power to exclude. They have no power to make an arbitrary order that the prisoners committed by this court shall not be admitted at all into the house of correction. Perhaps if they made some arrangement for the reception of these prisoners elsewhere, the case might have been different; but merely to direct that the prisoners committed by this court to the house of correction, pursuant to a former statute, shall not be received into that prison, without directing what else is to be done with them, is not classifying, but merely shutting out. If, however, they are authorized to make an order excluding a particular class of prisoners from a particular prison, at all events it must be a condition precedent that they shall make some other disposition of them. The act seems to make the gaols and houses of correction within a county a sort of system of prisons, resembling a system of apartments in the same prison; and the justices of the county are empowered to make an order directing in what gaol or house of correction the prisoner shall be detained. They may determine in which a particular class is to be detained, and after they have made that determination no classification is to be made inconsistent with the arrangement. The proviso, at the end of the fourth section, evidently contemplates an order, directing in what manner every particular

class of prisoners shall be disposed of. [*Patteson, J.* There is a sentence before that which seems to imply that the justices are not bound to declare or to speak of all classes of prisoners, because the clause says, first of all they shall direct what class of prisoners particular prisons shall be applicable, and then it says, "and all persons not coming within the class or description of prisoners who may lawfully be committed or detained in such prison, or shall be appointed by the justices for the confinement of one or more class or classes of prisoners, may be removed to the gaol or house of correction of the county, riding or division, and every such gaol or house of correction shall be deemed the legal gaol, prison or place of confinement of every person respectively committed to the same in pursuance of such order as aforesaid." [*Sir J. Scarlett.* Still they cannot commit a debtor to the house of correction.] The justices are bound to exercise their jurisdiction to provide for all the prisoners lawfully brought before them. If the justices have an arbitrary jurisdiction altogether to exclude particular prisoners from their prisons, they may exclude from one, and if the prisoners be sent to another district, such as Whitecross Street or Newgate prisons, the justices of that district having an equally arbitrary power, they in their turn may refuse to admit them, and so at last the prisoners will be excluded from all the gaols. If the justices had made an order excluding prisoners for debt from the house of correction, and directing their admission into another, after that it may be true that no classification of prisoners is to be made in the house of correction inconsistent with the provisions of the statute. This case came on at first in the shape of an application for a mandamus; and if the mandamus had gone, the justices ought to have returned that they had made an order, and to have stated that by that order they had disposed of the different classes of prisoners within their jurisdiction, and that they had disposed of prisoners for debt in a particular manner.

It is perhaps unnecessary to argue upon the statute,

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respecting the new prison in Whitecross Street, because perhaps the question will turn more upon the statute of *Geo. 4*, than upon any provision in that act. Whitecross Street prison is not a county gaol; taking it to be a substitute for Newgate, that prison does not appear from the preamble of *52 Geo. 3* ever to have been a county gaol for persons confined for debt, although it was a prison for persons in the custody of the sheriff; and by the statute itself it is not made a county gaol, for though it is said that it is to be called "The Debtors' Prison for London and Middlesex," there are provisions in the act which are quite inconsistent with provisions relating to a county gaol.

The statute of *2 W. 4*, cap. lxxv. appears to afford conclusive evidence that the legislature contemplated, at the time the act passed, that prisoners from the Court of Requests were to be committed to the house of correction, unless the justices made some other provision respecting them. [*Littledale, J.* The act does not say that any prisoner shall be confined for debt in the house of correction; and this is not contemplated by the act of *4 Geo. 4*.] After the general order should have been made, it was perhaps intended that persons should not be confined in the house of correction for debt. [*Littledale, J.* referred to and read the sixth rule from the *4 Geo. 4*, c. 64.] That directs in what manner the justices shall classify, and they are bound in classifying to find a place for every prisoner; but until they have made arrangements, by which every prisoner is provided for, the former state of things must continue. [*Parke, J.* You contend that a single order is invalid unless there are a series of orders providing for all the classes at the same time.] All must be provided for before one class can be excluded from a particular prison; for otherwise it might be productive of great inconvenience. [*Parke, J.* The magistrates have a power of making orders from time to time; and it is enacted that after the making of such order, &c. such class or classes of prisoners as shall be specified in such order, and no other,

shall be committed to or detained in any such gaol, house or houses of correction, or any part of them respectively, and then other classes, not included in that order, may be removed to the gaol or house of correction. Therefore if one or more classes are ordered to be confined in the house of correction, all the rest are to go to the gaol.] This is an order to exclude one, and therefore it does not comply with the terms of the statute. [*Patteson, J.* The act says that no person shall be committed or detained there, but those that are specified in the order. Now this is not a specification, and therefore the order does not in terms comply with the act; but quære, if there be a hundred classes, and the order excludes one, whether that does not amount to a direction to commit and detain the other ninety-nine?] The justices are bound to take care of, and to provide for all.

The act of 2 *Will. 4* shews that the legislature contemplated that the Court of Requests had the power of sending to the house of correction. The clause relating to debtors does not say where the party is to be kept in custody, but such a direction is to be found in all the other clauses in that statute, directing confinement, and not giving the option of sending to the house of correction or gaol. [*Littledale, J.* There are three cases. *Patteson, J.* A certain number of classes they have the power of sending either to the gaol or to the house of correction; all prisoners for contempt they seem to have the power of so sending.] A commitment for non-payment of money, is in fact a commitment for contempt; and it appears very improbable that the legislature, in passing this new act, should have contemplated that prisoners for one sort of contempt might be sent to the house of correction, and that only prisoners for contempt in not obeying an order for the payment of money should be sent to the gaol. The commissioners are entitled to this privilege at all events, unless the parties assign some better reason than this, that their prisons are crowded, which applies equally to all the prisons. In point of fact, serious

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difficulty has been thrown upon the commissioners by the refusal of the justices to admit their prisoners into the house of correction.

Sir *James Scarlett* contra. The question arises merely upon the acts of parliament. The Court of Requests had power by former acts to commit to the house of correction. The question is, whether the 4 *Geo.* 4, c. 64, has not repealed that power. That act was passed for the purpose of consolidating and amending the laws relative to gaols and houses of correction in England and Wales. The preamble recites the great importance of, amongst other things, due classification, and it is afterwards stated that the regulations contained in that act shall apply to every gaol or house of correction maintained at the expense of the county, &c. The justices are to carry the act into effect, and they are to "ascertain and declare to what class or classes of prisoners every such gaol, house or houses of correction, or any part or parts of them respectively shall be applicable." The word "respectively" contracts these clauses. If the powers and regulations are regarded, it will be found that there is no power whatever to confine debtors in the house of correction, and therefore the word "respectively" only means that where it relates to such persons as may be confined in gaols or houses of correction respectively, they are to appropriate such part of the gaol or house of correction respectively as they think proper for their reception. Whatever power the words of the former part of the fourth section might give the justices, it is restrained by the latter part of that section which disables them from making any classification inconsistent with the rules prescribed by that act. An order therefore to exclude prisoners for debt from the house of correction was lawful, but an order to admit them would have been illegal, because inconsistent with the rules relating to houses of correction. In the fifth section, which provides for the case of a gaol and house of correction forming parts of a building, it is

provided at the end that prisoners for *debt* may be removed to and shall be confined in that part or parts of such building as shall be ascertained and appropriated as and for the gaol of the county. This is the great clause which shews that the spirit of the act was, that no debtor should be confined in a house of correction. The tenth section contains the rules which are to be observed and carried into effect in all prisons; and as by the sixth rule debtors are to be confined only in gaols, the magistrates, who can make no order for classification inconsistent with any of the rules, have no power to determine by any order, special or general, that debtors shall be admitted into the house of correction. They may have the power to order which shall be the house of correction and which the gaol, and what parts shall be appropriated to particular classes; and no commitment must be made contrary to the order, but their regulations must be governed by the provisions of this act, which are paramount to all orders, and which exclude debtors from the house of correction. Subsequent clauses of the act are in the same spirit. By the 49th section, which contains a plan for separate places of confinement, an apartment is to be provided for debtors in the *gaol*, but none in the *house of correction*.

The 4 *Geo. 4* evidently repeals a vast number of other acts; it does not relate to Courts of Request, local jurisdictions, or local gaols, but it undoubtedly embodies all the acts of parliament regulating *public* gaols into one, for the purpose of introducing classification and other regulations which have been found in modern times essential for the preservation of health in gaols, and, as far as that object is attainable, for the improvement of the morals of the prisoners; and it is impossible to read the act without seeing that one of its leading features consists in the intention to prevent debtors from being sent to houses of correction.

The question then is, whether the later act of 2 *Will. 4*, cap. lxxv. in any respect qualifies the 4 *Geo. 4*, c. 64, or revives the original power of the Court of Requests to send prisoners

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to the house of correction. The clause that has been referred to, which re-enacts all clauses in the original act, not repealed, altered, or otherwise provided for, is not to be read as if the words were "*hereby* repealed &c." It does no more than perpetuate such powers as had not by any *intermediate* act been qualified. [*Patteson, J.* A part of your argument applies equally to prisoners for contempt of Court on civil process, as to debtors. Both are excluded from the house of correction by 4 *Geo. 4*, but the former may by 2 *Will. 4* be committed to that prison by the Court of Requests.] The contempt of Court intended in 2 *Will. 4*, is such a contempt as is in the nature of a misdemeanor. In the case of a debtor, it is plain that there is no clause in this act which revives any power that was abolished by 4 *Geo. 4*. [*Littledale, J.* The new act gives more specific powers in other respects relative to executions than were given by the old.] The act seems to have cautiously avoided re-enacting the original clauses.

It is unnecessary to say any further relative to the Whitecross Street prison, than that by the act it is made the county gaol for debtors, and that if the Court had a right to commit to Newgate, they may now commit to Whitecross Street prison. This Court, however, is not bound to find a place to which they may commit.

*J. L. Adolphus*, in reply. Whitecross Street prison is a gaol for London and Middlesex, but not the county gaol. There is a special organization of that gaol very different from that which has been insisted upon with respect to county gaols. It is a substitute for Newgate, which was not the county gaol for persons confined for debt. [*Parke, J.* Newgate is described in the preamble of the act for building Whitecross Street prison, as a prison for the confinement of felons and other offenders, and as also a prison for the confinement of other persons in the custody of the sheriffs of London and of the sheriff of Middlesex. *Patteson, J.* The new prison was to be called "The

Debtors' Prison for London and Middlesex;" and one of the four parts or prisons into which it was to be divided was declared to be the prison for persons confined under civil process, in the custody of the sheriff, and was directed to be appropriated accordingly. *Sir J. Scarlett*. In 7 *Geo.* 3, c. 37, there is this clause; "and whereas the gaol of Newgate (which is not only the county gaol of Middlesex as well as of London, but also the general prison for smugglers and debtors)."] The Whitecross Street act says, it shall be the gaol for felons and for felons only. Since the 4 *Geo.* 4, the county gaol has acquired a very particular character, and requires many things to fulfil that character, not possessed by Whitecross Street prison. [*Patteson, J.* The 52 *Geo.* 3 appropriates Newgate to the confinement of such felons and other prisoners liable to be confined therein, as are not by this act authorized to be confined in the new prison. *Sir J. Scarlett*. Whitecross Street prison is a mere enlargement of Newgate. *Parke, J.* That is the county gaol for this purpose.] Whitecross Street prison is a substitute for so much of Newgate as was a prison for the confinement of persons in the custody of the sheriff of Middlesex. Whether that makes it a county gaol is a matter of considerable doubt, or whether it follows that it is a gaol for the prisoners committed by the Tower Hamlets' Court. [*Parke, J.* By section 57 all prisoners by process of contempt for not paying any sum or sums of money or costs, issuing out of any court of law, and all prisoners for contempt of any court of equity, for not paying any sum or sums of money by any decree or order of any such courts, are to be, for the purposes of this act, considered as prisoners confined under civil process, and to be accordingly removed to and confined in the said new prison.] That is a very general clause, and may apply to many courts. [*Parke, J.* The Court of Exchequer has held that the Court of Requests is not a court either of law or of equity.]

The 48th section of this act reserves the power or au-

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thority of any judge, justice, commissioners of bankrupt or others, to commit any person or persons to the said gaol of Newgate, or to any other gaol or prison. [*Parke, J.* That would make *Newgate* the proper place for prisoners.] That might be a question, but it is not necessary to decide that now.

Upon the 4 *Geo. 4*, c. 64, it has been said that after the passing of that act no prisoner for debt could be committed to the house of correction; but that cannot have been so; for some time was required for making the change; and if the former state of things could continue at all, it must continue until the justices made a proper order. The act which directs classification says, that the justices *shall* meet to carry the act into effect; that they *shall* make orders for classification, and that *after* making these orders they *shall* make distribution of all the prisoners confined within their district; and that they shall make no classification inconsistent with that in the future arrangement of the prison.

Upon 2 *Will. 4*, cap. lxxv. if it be held that this Court of Requests may commit all other prisoners for contempt, then that sort of contempt which is involved in a commitment for debt must be included.

DENMAN, C. J.—I am of opinion that the keeper of the house of correction was not bound to receive the prisoner, and consequently that the rule for a mandamus must be discharged. It appears to me that notwithstanding the power given in the first instance, when the Court was erected, to the commissioners of this Court of Conscience for the Tower Hamlets, the 4th of *Geo. 4*, c. 64, s. 4, is quite inconsistent with continuing the power to commit debtors to the house of correction after the magistrates have exercised the authority conferred upon them by this clause. The words are, “that after the making of such order (which gives the magistrates power to classify the prisoners) and service of such copy thereof upon such keeper as aforesaid,

such class or classes of prisoners as shall be specified in such order, and no other, shall be committed to or detained in any such gaol, house or houses of correction, or any part of any of them respectively; and all persons not coming within the class or description of prisoners who may lawfully be committed to or detained in such prison as shall be appointed by the justices for the confinement of one or more class or classes of prisoners, may be removed to the gaol or house of correction of the county, riding or division." Then the power of classification is given in the 10th section, which expressly states, that in gaols debtors and all other persons committed for any offence may be confined; but when it speaks of houses of correction, then the word "debtor" is omitted, and it is only criminal prisoners that are to be admitted. Now the magistrates *have* exercised that power, and they have exercised that power to the full extent to which they thought it necessary so to do. I think it cannot be necessary that they should carry it into effect in all respects before the 4th clause attaches. The consequence of that is, that unless the 2 *W. 4*, cap. lxxv. restores that power, it is clearly, in my opinion, taken away. Now the 2 *Will. 4* makes no distinct allusion whatever, that I have been able to find, to the 4 *Geo. 4*. It is "to amend and render more effectual certain acts of the 23 *Geo. 2* and 19 *Geo. 3* for the more speedy recovery of small debts within the Tower Hamlets;" but if the intention had been to give the commissioners the power which appears to me to be evidently taken away under the circumstances which have occurred in this case, it ought to have done so by distinct and positive terms, that the legislature might have fully seen that they were called upon to do that, and to exercise their judgments whether they would or would not give them such a power as must repeal the former act of parliament for the regulation of gaols. That has not been done, in my opinion, and therefore the rule must be discharged.

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LITLEDALE, J.—I am also of opinion in this case that the keeper of the house of correction was not bound to receive this person, who was committed upon an execution. By the original act for the recovery of small debts in the Tower Hamlets, 23 *Geo. 2*, “the commissioners shall have power and authority, by virtue of this act, to give judgment and decree, and to award execution thereupon with costs, against the bodies or against the goods and chattels of all and every the person or persons against whom they shall give any judgment or decree, as to them shall seem just in law or equity; so as no person shall remain in custody upon an execution for any longer space of time than forty days.” Then it enacts, “that if any plaintiff or creditor, defendant or debtor, shall refuse to appear before the commissioners, or if any person shall not obey the order of the commissioners, or any three or more of them, it shall and may be lawful to and for the said commissioners, or any three or more of them, to commit every such person to the common gaol or house of correction for the said county of Middlesex, or to the gaol for the liberty of the Tower of London.” I observe now, because I shall have occasion to advert to the judgment hereafter, that the commissioners had power in the first instance, without the intervention of any other person, to commit to the common gaol or house of correction. Then comes the 4 *Geo. 4*, upon which the principal question arises. The 4th section of that act directs, that the justices shall, by orders to be made for that purpose, ascertain and declare to what class or classes of prisoners every such gaol, house or houses of correction, or any part or parts of any of them respectively shall be applicable. Then it goes on to state, that after the making of such order, such class or classes of prisoners as shall be specified in such order, and no other, shall be committed to or detained in any such gaol, house or houses of correction. Then in the 10th section it is recited, that it is fit and proper to secure uniformity of practice in the manage-

ment of the several prisoners to which this act shall extend; and there are certain rules to be observed in the classification of prisoners; and in those rules it is directed that the male and female prisoners shall be confined in separate buildings or parts of the prison, so as to prevent them from seeing, conversing, or holding any intercourse with each other; and the prisoners of each sex shall be divided into distinct classes, care being taken that prisoners of the following classes do not intermix with each other. In *gaols*, first, debtors and persons confined for contempt of court on civil process; second, prisoners convicted of felony; and there is a further enumeration of persons committed for misdemeanors. Then in *houses of correction*, first, prisoners convicted of felony; second, prisoners committed for misdemeanors; and so it goes on through several others, without saying any thing as applicable to debtors and persons confined for contempt of court on civil process. The 49th section uses very much the same language, and enacts, that provision shall be made for the separation of prisoners into the following classes; if a *gaol*, first, debtors and persons confined for contempt of court on civil process; secondly, prisoners convicted of felony, and so on. Then it goes to a *house of correction*; first, prisoners convicted of felony; secondly, prisoners convicted upon the trial of misdemeanors, and so it goes on, without saying any thing about debtors. Now it seems to me that those clauses are so far directory to the justices to make that classification under the 4th section, and in that kind of way which is directed, but it does not empower them to make any classification with regard to prisoners who are sent to the *house of correction* for *debt*. The first section enacts, that they shall make the classification, which they are directed to do by the two clauses I have alluded to; one of which provides, that no other person shall be committed. It seems to me that it is very plain. It shews, for the purpose of regulation, that no prisoners committed for debt shall be

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confined in the house of correction; and though it does not expressly repeal the clause in the 23 Geo. 2, with regard to the recovery of small debts in the Tower Hamlets, it seems to me to be an implied alteration of it. The first section in the new act (a) for the recovery of small debts in the Tower Hamlets, says, after reciting the former acts for the recovery of such debts, "That the said recited acts, and all the enactments, powers and provisions therein respectively contained, shall, so far as the same or any of them are not repealed, altered or otherwise provided for, be in full force and effect, and shall extend, and be applicable to all matters and all and every person and persons to whom this act doth or shall be applicable, in such and the same manner, and as fully and effectually as if the same were repealed and re-enacted in and by this act." Now it appears to me, that, under the act of parliament upon which I have just remarked, there is an implied, although not an express alteration of the power in the original act of parliament for the recovery of debts in the Tower Hamlets. There is an implied alteration of that which empowers them to send to the house of correction. Then it is to be seen whether this alteration is not in the actual contemplation of the legislature; I think it appears that this was clearly the intention of the 4 Geo. 4. It is to be observed, the 23 Geo. 2 gives an express power to commit to the common gaol or house of correction. In the present clause there are three cases, where there is a power to commit to the common gaol or house of correction. The first case is in page 1306, that if witnesses do not appear to give evidence, they shall forfeit any sum not exceeding 40s., and if the person or persons so offending shall not forthwith pay into the said court the penalty or forfeiture so imposed upon him, her or them, the commissioners may commit such person to the gaol or prison, commonly called the House of Correction, or to the common gaol of the county of Middle-


(a) 2 Will. 4, cap. lxxv.

sex. Then in page 1308 of 2 *W.* 4, there are several instances of contempt of court, in which they have also a power to commit to the house of correction; and in the latter part of the act there is a further power also to commit to the house of correction, in case of non-payment of penalties. Express power being given in three cases to commit to the house of correction, it remains to be seen what the act directs with regard to debtors. The clause with regard to debtors, page 1310, is, that in any case where the commissioners shall have made an order for the payment of money, it shall be lawful for the commissioners, in case of default or failure of such payment, at the times and in the manner thereby directed, to award execution, in the first instance, against the goods of the party or parties against whom such order shall be made; and thereupon it shall be lawful for the proper officer to issue a precept to one of the beadles, who is empowered to levy, by sale of the goods and chattels of such party, such sum or sums of money as shall be so ordered; and if the beadle return that there are no goods to be had, then they may direct an execution against the body. Clearly, therefore, there is a difference between the language of this clause and that of 23 *Geo.* 2. There, they are authorized, in the first instance, to commit to the common gaol or house of correction. Here, no such power is given to the commissioners. If they have an implied power, the *express* words of the act are not so; for these are, "it shall be lawful for the commissioners, in case of default or failure of such payment, at the times and in the manner thereby directed, to award execution, in the first instance, against the goods of the party or parties against whom such order or decree shall be made; and if the beadle shall certify that there are no goods whereupon such levy can be made, it shall be lawful for the commissioners to award execution against the body or bodies of the party or parties against whom such order or decree shall be made; and thereupon it shall be lawful for the

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proper officer to issue a precept to one of the headles, who is hereby empowered to take such party, who shall remain in custody until he, she, or they shall perform and obey such order. No power is given by the act, where it directs execution against the body, to commit to the house of correction or any gaol whatsoever; and therefore it is left to the operation of the common law as to what he is to do with him when he has him in custody; for the power of the commissioners is, to issue a precept to the beadle; and nothing is said as to what the beadle is to do with him. The statute then provides for a fraudulent concealment of goods, and execution is to issue either against the body or goods, and then it uses the same language as in the former part of the clause. Therefore, when I see in this act of parliament three specific cases where power is given to send to the house of correction; one, which is that now consideration, namely, process by execution against the body of the debtor, in which no such power is given, I think that, taken with the 4 *Geo. 4*, shows very plainly that the 23 *Geo. 2* can no longer apply to this case. Mr. *Adolphus* contended that the power to commit to the house of correction is for contempt, and that not paying money ordered by the commissioners is a contempt; but the act has not treated it so, for it talks of an execution against the goods and an execution against the body. All the cases of contempt in which there is a specific power to commit, are contempts done in the face of the court, such as witnesses not attending and not paying penalties, but the execution is differently provided for. It is expressly called in the act of parliament an execution. Under this act, suppose a person to be committed to the house of correction under some of the other clauses, where an express power is given by the act. That the justices had no power to make a classification, I will not pretend to say, it is not necessary to give an opinion upon that; but if by 2 *W. 4*, a new power was given to commit

to the house of correction, that might create a new classification, and the keeper of the house of correction might be compelled to receive them, independently of any classification by the justices; but I have no doubt that the power given by the 23 *Geo. 2*, as to debtors, is by virtue of this general act of parliament repealed.

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PARKE, J.—I also think that the rule must be discharged. Under 23 *Geo. 2*, c. 30, it is quite clear, the commissioners, or any three of them, had power to make orders concerning the payment of debts, and that they had the option of committing any person disobeying that order, either to the house of correction or the common gaol for the county of Middlesex; and that option continued down to the passing of 4 *Geo. 4*, c. 64, or rather until the putting of that act into effect; for I take it, the different regulations of that act are not to be complied with until the justices at the Michaelmas quarter sessions, or any subsequent general or quarter sessions, should have given effect to the act, by making the proper order or orders for the purpose of ascertaining the different classes of prisoners in different gaols. The only doubt I have felt, and I cannot say that that doubt is entirely removed, is, whether the justices *have* carried this act into effect. If they have done so, the option given by 23 *Geo. 2*, of committing to the gaol or house of correction is determined, and the commissioners must commit to the county gaol and not to the house of correction. The case does not state the orders they have made upon the subject; but probably they have made different orders with respect to the house of correction, directing certain classes to be committed to and detained in prison in the house of correction; and if they have done so, it seems to me to follow, that they would make no express order with respect to the county gaol, but that all other classes which can by law be confined in a county must be confined there. The doubt I feel is, whether the order set out in

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the case, directing the keeper of the house of correction to exclude debtors, is a complete performance of their duty with respect to the house of correction. Supposing it is so, and that they have completely appropriated the house of correction to the different classes, they by law are to confine there, then it seems to me they are not bound to make any order with regard to the county gaol; for by the 4th section all other prisoners are to be confined in the county gaol, and after the making of any order with respect to the house of correction, no prisoner is to be committed to the house of correction, except those persons who are specified in that order. Now assuming they have made such an order, then after the making of that order the option under 23 *Geo. 2*, c. 20, was determined, and that certainly is not revived by 2 *Will. 4*, cap. lxxv. because that act, with respect to orders for the non-payment of debts, does not give any express power to the commissioners to confine either in the house of correction or in the county gaol. The act only gives them power to issue a precept to the beadle to take the party into custody. I do not know that by the common law the beadle of such a court as this has power to confine in any particular place; therefore I should say by the operation of the act, the beadle might confine in that place where, by the statute law, persons for the disobeying of such orders as this may be confined. This would be in the county gaol, and not in the house of correction. That appears to me to be the case, inasmuch as 2 *Will. 4*, cap. lxxv., clearly continues the powers of the former acts, only so far as they have not been altered by the existing law. It does not say, so far as they have not been altered by the former acts, but so far as the same or any of them are not repealed, altered or otherwise provided for, they shall be in full force and effect; that is the powers given by 23 *Geo. 2*, so far as they are not repealed, altered or otherwise provided for. But I am of opinion that the 4 *Geo. 4*, c. 24, and the magistrates' order thereupon, did make another provision by law with respect

to debtors, who are ordered to pay their debts by the commissioners of a court of requests. What may be the case with regard to those persons who are by the express provisions of 2 Will. 4, cap. lxxv., to be confined *either* in the house of correction or the county gaol, in the option of the commissioners, is a matter we have not any thing to do with. For these reasons it seems to me, notwithstanding the doubt I have expressed with respect to the 4 Geo. 4 having been carried into effect, that we ought to discharge this rule. The consequence will be, that in future the commitments of persons of this description ought to be to Newgate, or to Whitecross Street prison. It is not necessary to say which, probably Newgate.

PATTESON, J.—I am also of opinion that the rule for a mandamus ought to be discharged. By 23 Geo. 2 it is enacted, that persons who neglect to comply with the order of the commissioners of the Tower Hamlets, may be committed to the common gaol *or house of correction* for the said county of Middlesex, or the gaol for the liberty of the Tower of London, if such person shall reside within the said liberty, there to remain until he, she, or they shall perform the order of the said commissioners, so as no person shall remain in custody for any longer space of time than forty days; and, undoubtedly, under that act of parliament there was power to commit to the house of correction; and so it continued until the 4 Geo. 4, c. 64, was enacted; because although the 52 Geo. 3 has been referred to with respect to Whitecross Street prison, yet upon looking into that act I do not know that it does materially affect this case. But the 4 Geo. 4 certainly does; for it is quite clear that the whole scope of that act is to prevent debtors being confined in the house of correction at all. It is to classify prisoners in the house of correction; and, properly speaking, no prisoners could be confined in the house of correction who were *sheriff's* debtors; no debtors

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at common law, because the house of correction was not the prison of the sheriff. And yet the sheriff was answerable for the debtor, and of course the debtor therefore should have been in the sheriff's prison. But, by 23 *Geo. 2*, they are to be committed to the house of correction. Now it seems to me, before they made that alteration, it might be altered, because by the order of magistrates you could no longer commit to the house of correction, even under 23 *Geo. 2*, if an order of magistrates had been made by the authority of that statute. It seems to me to be clear, that the order of the magistrates itself is not couched in the language which would almost be expected from the section of the act, which requires that the magistrates shall specify the classes of prisoners who are to be confined in particular places; but it is tantamount to it; for they say that ninety-nine must be committed to the house of correction, omitting the hundredth, and therefore, whether they say where the ninety-nine shall be committed, or where the one shall be committed, leaving out the ninety-nine, it comes to the same thing. It seems that the magistrates *have* made an order thereupon, taking that order, by the 4 *Geo. 4*, to apply to either of the options given to the commissioners of the Tower Hamlets to commit to the county gaol or to the house of correction, as they should think fit. Then is 4 *Geo. 4* repealed by 2 *W. 4*? At first I felt considerable difficulty on that part of the case; but upon looking at the first clause of 2 *W. 4*, it does not say, "so far as the same are not altered by this act," but "that all the enactments, powers and provisions of the former acts shall be in full force and effect, so far as the same or any of them are not repealed, altered or otherwise provided for." Now if I cannot avoid coming to the conclusion that the provisions of this act with regard to committals to the house of correction are repealed, altered or otherwise provided for by the 4th of *Geo. 4*, this act of course does not restore them.

That being the case, it seems to me the rule for the mandamus ought to be discharged.

Rule discharged.

DENMAN, C. J.—Mr. *Adolphus* seemed to admit that a classification had taken place, although that is not stated in the case, and the question is properly put upon this ground; because the magistrates will do that to-morrow, if it is necessary to be done.

*J. L. Adolphus.* We do not know that fact, one way or the other.

DENMAN, C. J.—I mean that the case has been decided upon the real merits.

*Mr. Rotch (a).* That order certainly will be made a general order under the provisions of the act.

(a) Chairman of the quarter sessions for the county of Middlesex.

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THE defendants, who are clergymen, residing at Great Cornard, in the county of Suffolk, were charged before two magistrates of that county with a capital felony, but were discharged on bail for their appearance at Bury St. Edmund's, at the ensuing Suffolk Lent assizes, 1833. Great Cornard is in the Liberty of Bury St. Edmund's, which Liberty comprehends a large portion of the county of Suffolk. For the Liberty a grand and a petty jury are summoned at the assizes, distinct from the grand and petty jury of the county at large, and all offences committed within the Liberty and tried before justices of oyer and terminer, are tried by a Liberty jury. Previously to these assizes, Sir *James Scarlett* obtained a rule for a certiorari;

The Court of K. B. has a discretionary power of ordering a suggestion to be entered on the record, if an indictment for felony removed thither by certiorari, for the purpose of awarding the jury process into a foreign county; but this power will not be exercised unless it be absolutely necessary for the purpose of securing an impartial trial.

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to remove into this court any indictment which might be found against the prisoners at the ensuing assizes. For this rule the prosecutor's assent had not been obtained, nor had he had any notice of it; and it was made absolute, in the first instance. After the commission had been opened at Bury St. Edmund's and before the bill had been found or the certiorari served, the prosecutor's counsel applied to the learned judge to call the defendants and their bail on their recognizances. This was accordingly done, and the judge (Mr. Baron *Vaughan*) directed the recognizances to be estreated. The defendants subsequently put in fresh bail in this court, before a judge at chambers, after which no opposition was offered by the prosecutor to the discharge of the former recognizances. The defendants having pleaded in this court, Sir *J. Scarlett*, in Easter term last, obtained a rule nisi to enter a suggestion on the record, that an impartial trial could not be had in the county of Suffolk, in order to the award of a venire into another county. In support of this application, he produced numerous affidavits of the prejudice existing against the defendants in the county of Suffolk.

*Byles* now shewed cause. The Court, it must be admitted, has the power to make this rule absolute. At the common law, all crimes are triable by a jury of the county where committed, and where an indictment is removed into this Court, the trial is at the common law at bar, by a jury coming up from the proper county. By consent of the attorney general (for the statutes of nisi prius do not bind the king), a writ of nisi prius may be had, but the venire must be directed into the proper county, or it will be a mis-trial, unless this suggestion be entered on the record, which will estop both parties. But though the Court may, by ordering this suggestion to be entered, direct a venire into a foreign county, it has never yet done so in a case like this; and every step of the proceeding is full of danger. Generally speaking, the

certiorari itself, which is the first step towards the suggestion, discharges the recognizances of the defendants and their bail, which are merely conditioned for defendant's appearance at the assizes, *Rex v. Richardson* (a); and this effect would have been produced in the present instance, had not an application been made to the judge to call the inditees upon their recognizances before the writ was served. It also discharges the prosecutor's recognizances; and it is not clear that any authority can compel him to go on with the prosecution. It further discharges the recognizances of all the witnesses, and unless they can be served with a subpoena, (out of the way of which defendants may often keep them) they cannot be compelled to attend. It discourages public justice, by depriving the prosecutor of his costs of his prosecution under 7 Geo. 4, c. 64, s. 22 & 23. This has been decided on the section relating to felonies, as well as on that relating to misdemeanors; *Rex v. Exeter County Treasurer* (b); *Rex v. Richards* (c); *Rex v. Johnson* (d); *Rex v. Kelsey* (e). That is a hardship on the prosecutor, for part of the expenses which he ought to be reimbursed, viz. attending before the examining magistrate, and at a long distance from home before the grand jury, has already been incurred. If this rule is made absolute, except on terms, he will not only be deprived of the costs incurred, but put to great further costs, in conveying himself and his witnesses to a distance. This course will generally cause delay; and in the present instance it has delayed the trial half-a-year, in which period the alleged excitement may have much subsided. The effect of the certiorari being to substitute a county (f) for a Liberty jury, the danger of a partial trial is already obviated, for the affidavits are made merely by persons residing within the Liberty and not in the county

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(a) 2 Leach, C. C. 3d ed. 637.

(b) 5 M. &amp; R. 168.

(c) 8 B. &amp; C. 420.

(d) 1 R. &amp; M. C. C. 173.

(e) 1 Dowl. Prac. Ca. 481.

(f) 6 Geo. 4, c. 50, s. 13.

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at large. If this rule be made absolute, the Court will set a precedent which they will be continually importuned to follow. At present no case is to be found, either in print or manuscript, either at the crown office, or in the memory of the oldest practitioner, of the removal of an indictment for a capital felony by certiorari, from a court of oyer and terminer for a county at large, at the instance of the defendant. A certiorari to remove an indictment for murder from the county of York, was applied for in *Rex v. Mead* (a), but refused. It was indeed granted to remove an indictment for murder from the Rochester Borough Sessions, *Rex v. Thomas* (b). But there are reasons why an indictment should be removed from a borough sessions, which do not apply to a removal from a Court of oyer and terminer for a county. The prisoner is not, at that borough sessions, tried by a judge of the superior Courts, and the number of persons from whom the jury is to come being much more limited, the danger of a partial jury is proportionably increased. All the other cases of felonies are either where the felony was not capital (in which case the public are not so deeply interested), or where the indictment was removed from the sessions. *Rex v. Fawle* (c), *Rex v. Ward* (d), *Rex v. Gilbie* (e).

The prosecutor has great reason to complain of the mode in which the certiorari was obtained by the present defendants. It was obtained without his consent, without a rule nisi, or even any notice to him. There were rules nisi in the following cases:—*Rex v. Fawle* (f), *Rex v. Hunt* (g), *Rex v. Mead* (h), *Rex v. Thomas* (i), *Rex v. Ward* (k); and it is laid down in 2 *Hawk.* 27, s. 27, that even where the writ is applied for by the prosecutor, there should be a rule nisi, unless the king prosecutes

(a) 3 Dow. & Ryl. 301.

(b) 4 M. & S. 442.

(c) 2 Ld. Raym. 1452.

(d) Ibid. 1461.

(e) 5 M. & S. 590.

(f) 2 Ld. Raym. 1452.

(g) 3 Barn. & Ald. 444.

(h) 3 D. & R. 301.

(i) 4 M. & S. 442.

(k) 2 Ld. Raym. 1461.

by the attorney general. In *Rex v. Duchess of Kingston* (a), where a certiorari had issued at the instance of the defendant, this Court, of its own motion, directed it to be quashed, because the prosecutor's consent had not been obtained. Besides, it is doubtful whether, when this writ was obtained, it was clearly stated to the Court that the charge was a capital one, and that the prosecutor was poor. But whatever irregularity may have been committed in obtaining the writ, the prosecutor does not seek to set the writ aside, or to discharge this rule, if the Court think it can be granted without prejudice to the public, provided the Court will impose such terms on the defendants as will place the prosecutor in as good a situation as he would have been in if the prosecution had proceeded in the ordinary course. This will not be done, unless the Court compel the defendants to pay the ordinary costs of the trial, the costs in this Court, the costs of the removal, and the costs of this application, and the costs after as well as before judgment. As to the costs after judgment, if this rule be made absolute, the defendants may be capitally convicted in a foreign county, in which case they cannot be re-conveyed for execution into Suffolk at the expense of the county into which they are removed, or of that out of which they are removed, or at their own expense. The 27 Geo. 2, c. 3, the only act now in force as to the expense of carrying convicts to gaol, does not apply to this case. But it will be for the prosecutor to take them back, *Rex v. Gilbie* (b), and that must be done at his own expense. Besides, there may be other proceedings after judgment, and it is the duty of the prosecutor to carry on proceedings to execution. Where the defendants cause an indictment to be removed, an obligation on them to pay costs is sanctioned by the legislature and by precedents in this Court. The 4 & 5 W. & M. c. 11, s. 2, requires defendants, who remove an indictment by certiorari from the sessions, to pay the costs. The 38 Geo. 3, c. 52, s. 8, which

(a) Cowp. 283.

(b) 5 M. &amp; S. 520.

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provides for the removal of indictments from a county of a city to a county at large, directs that the common costs shall be paid by the same persons as would otherwise be liable to pay, and that the removing party shall enter into recognizances to pay the extra costs. In *Rex v. Hunt* (a), the costs were paid by the defendants. So in *Rex v. Hodgson* (b). [Parke, J. In that case only the extra costs were paid.] At all events, the Court will not remove this indictment off the circuit. That would entail still greater expense, and would be inconvenient to the prosecutor's attorney; and if defendants can fix the county in which they will have their case tried, they can, by so doing, often select their judges. A difficulty also arises with respect to the witnesses for the prosecution. To get the depositions, which are in the legal custody of the clerk of the assize for the Norfolk circuit, the prosecutor must subpoena that officer and take him from his duties, or issue a certiorari to bring up the depositions into this Court, that they may be sent down to another circuit.

Sir J. Scarlett, and B. Andrews, contra. The Court has authority to send this indictment down to be tried at nisi prius, if they think proper. By 14 Hen. 6, c. 1, it is enacted "that the justices before whom inquisitions, inquests, and juries, from henceforth shall be taken by the king's writ called nisi prius, according to the form of the statute thereof made, shall have power of all the cases of felony and of treason to give their judgment." The object of this statute was not to give jurisdiction to the justices of nisi prius, for they had that before, but to supply a defect in their authority, and to enable them to pass sentence, which they had not previously authority to do. It appears that even treason at that time was tried at nisi prius. *Farewether's* case (c). There are several instances in which the Court has sent an indictment to be tried at the assizes

(a) 3 B. & A. 444.

(b) MSS.

(c) Cro. Car. 348.

upon the application of the defendant (a). In *Rex v. Thomas* a certiorari was granted at the instance of the defendant, to remove an indictment for murder found against him in the city of Rochester, and the prisoner was afterwards tried at nisi prius. The Court has a discretionary power. There may be a difference in the exercise of that discretion. The Court may consider more gravely before they determine to remove an indictment for felony, than where the indictment is for a misdemeanor: so also they may require weightier reasons to induce them to remove an indictment from a Court of oyer and terminer, than where the indictment is in a Court of inferior jurisdiction. The law requires misdemeanors, like felonies, to be tried within the jurisdiction in which the offence is committed. Yet the Courts have often changed the venue in cases of misdemeanor. *Rex v. Thomas* seems to be a complete authority on the point. The principle is the same, namely, the sending a case of felony to be tried by a different set of jurors. [*Patteson, J.* The application was made to me in the Bail Court, but I thought I had no authority under 38 *Geo. 3, c. 52.*] It is not consistent with reason that the Court should be invested with authority to see that a man shall have an impartial trial in cases where his liberty or property only are at stake, and not in cases where his life may be affected; the greater the penalty, the more requisite is it that an impartial trial shall be insured. [*Littledale, J.* A felony was tried before me at nisi prius at Exeter (b).] That is the case of *Rex v. Ellis* (c), which is in point. [*Parke, J.* The 10th section of 38 *Geo. 3, c. 52*, exempts the city of Exeter from the operation of that act.] The jurisdiction of this Court to remove an indictment in any case is not founded upon any particular law, but upon the general authority that is intrusted to it to see that justice is administered fairly and impartially within the kingdom. In the case of

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(a) 4 Inst. 160.

(b) The trial was at the assizes for the county of Devon, held at the castle of Exeter. The indict-

ment had been found in the county and city of Exeter.

(c) 6 B. & C. 145.



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*Rex v. Mead*, the application for a certiorari would have been granted but for the delay which had taken place.

DENMAN, C. J.—I apprehend that the power of changing the venue in all cases is a necessary part of the jurisdiction which is entrusted to this Court, for the purpose of insuring a fair trial to a party, as far as human means can procure it. I cannot feel any doubt that the Court possesses the power of changing the venue in cases of felony, as well as in misdemeanors; supposing a case to occur in which it is absolutely necessary to secure the ends of justice, that some other venue should be resorted to than that in which the criminal would, according to the ordinary rules of law, be tried. They have exercised that power in some cases of felony, in which the parties would otherwise have been tried within very limited jurisdictions; but I do not find that there is any precedent whatever in which they have done so in the case of the county at large. I should just observe, that for my part I certainly have much reluctance in thinking that it ever can be necessary to change the venue from one great county to another; to take the trial from any considerable county for the purpose of securing an impartial trial. Even in cases of misdemeanors, the Court has not exercised its discretionary power, unless there has been some peculiar reason which has made the case almost one of necessity. In the case of Nottingham, the inhabitants themselves were the defendants; in the case of Bristol, last year, the inhabitants of Bristol were naturally strongly excited upon the subject. In *Rex v. Hunt*, the whole of the authorities of the county of Lancaster were brought in question; and in *Rex v. Waddington*, the whole of the yeomen of the county were parties to this sort of conspiracy for which Mr. Waddington was tried. In this particular case, I must own, that after giving very serious consideration to the subject, it does not appear to me that any such case of necessity is made out as should induce us to exercise our discretion in changing the venue,

even if this had been a case of misdemeanor only; because although some of the magistrates who would not be called upon to try the case of felony, have clearly committed themselves, the great body of freeholders do not appear to be likely to entertain any prejudice on this subject beyond that which the nature of the offence naturally excites, and that is common to all counties wherever such a charge is heard of. We certainly see in mankind a great proneness to prejudice; feelings may at first be strongly excited; but I think that when the jury are called into the box upon their oaths to pronounce on the lives of their fellow creatures, those prejudices ordinarily die away, and that men are persuaded that on such occasions no sort of feeling ought to exist upon the subject, until the fact is established through the medium of their understandings. This is a duty which juries are more and more learning to practice, and I believe we shall rather relax that feeling on the part of juries if we are too willing to suppose that they will be actuated by this sort of impression. I think there are very great objections in point of precedent to granting the present application, as every man feeling his own case to be the most important, there is a probability of such applications being frequently renewed in criminal cases; but if I were convinced that a fair trial could not be obtained in the particular county, I certainly should, notwithstanding these difficulties, give my voice in favour of exercising the jurisdiction of the Court for the purpose of securing that which is the first object of the criminal law—a tribunal that can try fairly. In this case there is one further observation to be made, which is this, that a considerable time has elapsed since the impression was produced, which I must hope has led to the subsiding of that violent feeling which all persons exercising common sense must observe it is quite improper to entertain, until the facts themselves are clearly and distinctly proved. With all these views, therefore, and with the most perfect persuasion in my own mind, that subject to the right of chal-

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lenging and selecting from so very large a population there can be no doubt whatever that an unprejudiced jury may be found, and although we may wish the administration of justice to be not only perfectly pure in itself, but free from any thing like the appearance of reasonable complaint on the part of any one, I think on the whole that the balance of convenience requires us to decide against this application. I am perfectly satisfied (which I beg to repeat) in my own mind that in a county like that of Suffolk, and under these circumstances, there is not the least real danger of any prejudice existing in the minds of those who, in the natural course of the constitution, are appointed to try this case; and it is upon this persuasion that I act in refusing to remove this indictment. I am therefore of opinion that this rule must be discharged.

LITLEDALE, J., PARKE, J., and PATTESON, J., concurred.

Rule discharged (a).

*Byles* applied for costs, viz. those which had been sustained by the prosecutor by reason of the certiorari, and the costs of the present application.

Upon which the COURT said, that the rule should be discharged with costs, the defendants undertaking to pay the costs incurred in this Court, and to give security to the master to pay such further costs as the judge at the trial should think reasonable, on condition that the prosecutor should not apply to quash the certiorari.

(a) At the following summer assizes for the county of Suffolk, the defendants were tried and acquitted before a jury from the Li-

berty of Bury St. Edmund's, Sir *James Scarlett* appearing for the defendants.



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WILLIAM DIXON the Younger and HENRY ROUNTHWAITE  
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**FEIGNED** issue, directed by *Parke, J.*, under the Interpleader Act (*a*), to try whether the property in, or the right of possession of, 44 puncheons of rum, marked and numbered as in the issue described, then being in a certain warehouse of the defendant *Yates*, or any part thereof, was in the plaintiffs, on the 18th of November, 1831, on which day they demanded the same of the defendant *Yates*, who then refused to deliver the same, or any part thereof, to the plaintiffs. At the trial before *Patteson, J.*, at the Spring assizes for Lancashire, in 1832, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case:

28th June, 1831. The plaintiffs, who are spirit merchants at Liverpool, purchased of the defendant *Yates*, 147 puncheons, 10 hogsheads, 2 barrels of rum, which *Yates* had bonded in his own name, in his own bonded vaults, in Atherton Street, Liverpool. At the time of this purchase an invoice was handed by *Yates* to the plaintiffs, specifying the marks and numbers of each puncheon or cask, the name of the vessel in which the rum had been imported; and at the bottom was written "Warehoused per *J. B. Yates* and Co. in *Yates's*, Atherton Street."

The price, 1812*l.* was paid by the plaintiffs to *Yates*, partly in August and the remainder in September.

Same day (28th June). The plaintiffs resold 35 puncheons to *Collard*, who was clerk to *Yates*, and also carried on business on his own account as a spirit merchant, with the knowledge of his employer. For the price of the 35 puncheons, *Collard* accepted two bills for 240*l.* each; and after the sale the plaintiffs gave to *Collard* delivery-orders on *Yates* for the whole 35 puncheons. The invariable

*A.* sells to *B.* rum lying in the warehouse of *C.* at *L.*, and delivers to *B.* an invoice with marks and numbers. *B.* accepts the draft of *A.* for the price, and sells to *D.* and obtains payment from *D.* The usage at *L.* is for the vendor to deliver to the vendee delivery orders, addressed to the warehouseman, who accepts such orders. No delivery-order is given by *A.* to *B.*, except for a small portion of the goods, which *B.* receives. By the permission of *B.*, but without the knowledge of *A.*, *D.* gauges and coopers the casks in the warehouse and marks them with his initials. Upon *B.*'s acceptance being dishonoured, *A.* has a lien upon the rum for the price.

(*a*) 1 & 2 Will. 4, c. 58.

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mode of delivering goods in warehouses at Liverpool, is by handing delivery-orders. *Yates* kept no transfer books.

5th October, 1831. One of the bills given in payment for the 35 puncheons was dishonoured, and was taken up by the plaintiffs. Up to that time *Collard* had been in good credit with the plaintiffs.

29th October, 1831. The second bill being nearly at maturity, the plaintiffs, to save their own and *Collard's* credit, advanced money to take it up. Both bills were in the hands of *Moss and Co.* the bankers of the plaintiffs.

13th August, 1831. The plaintiffs purchased of *Yates* 51 puncheons of rum, bonded as the former parcel. An invoice was delivered by *Yates* to the plaintiffs, purporting that the latter had bought from *J. B. Yates and Co.* 51 puncheons Jamaica rum, payment two months and two months, and specifying numbers and marks, with this memorandum, "Warehoused per *J. B. Yates and Co.*, 29th July, 1831, in *Yates's*, Atherton Street." The price of this second lot, 624*l.* 6*s.* 1*d.*, the plaintiffs paid to *Yates* on the 5th November, 1831.

Same day (13th August). The plaintiffs resold to *Collard* 46 puncheons, viz. 10 puncheons of the first and 36 of the second parcel, and delivered to him an invoice, specifying the marks and numbers. For the price, 589*l.* 6*s.* 2*d.*, *Collard* accepted two bills, drawn upon him by the plaintiffs, dated 13th August, 1831, payable respectively at three and four months, at *Barclay, Trittons and Co.* in London. One of these bills the plaintiffs paid away, the other they paid to their bankers as cash.

The plaintiffs had often had dealings with *Yates* before. During several years they had bought of him large quantities of rum, which they left in his cellars, and when they effected resales they gave delivery-orders to the purchasers, and *Yates* had not delivered any of such rums bought on former occasions by the plaintiffs, without having received delivery-orders from them. *Yates* was not in the habit of accepting general delivery-orders, but when the plaintiffs bought of him goods lying in bond, they got orders

accepted as they wanted them out. In the meantime the plaintiffs looked after the casks, sampled them and coopered them as occasion required. The plaintiffs did not get a delivery-order accepted for either of the parcels bought by them on the 28th June and 13th August, 1831, but resold a part of each parcel to *Collard* on the day of the purchase, to which resale the want of a delivery-order was no impediment. The rums which the plaintiffs bought on the 28th June and 13th August, were sampled on the quay when landed, and the samples taken to *Yates's* sale-room. The plaintiffs received the samples of those only which they did not sell to *Collard*. The remainder *Collard* left at *Yates's*, concealing them from *Yates*. It is invariably the custom for purchasers of rum to take the samples and to cooper the casks. *Collard*, soon after the purchase, had the puncheons which he bought coopered in *Yates's* warehouse, and marked C. The plaintiffs never touched those puncheons or sampled them, but left *Collard* to look after them. After the last-mentioned purchase by *Collard* from the plaintiffs, he applied to them for delivery-orders on *Yates*, which they refused to give, but said that if he wanted one or two puncheons they would let him have them. In consequence of which *Collard* addressed to them two orders, by each of which he requested them to deliver one puncheon of rum, marked J. B. Y. J. T. 33, bought 13th August, 1831. The plaintiffs gave corresponding orders on *Yates*, and two puncheons, part of the 46 puncheons sold on the 13th of August, 1831, were delivered to a purchaser from *Collard*. The remaining 44 puncheons were the subject-matter of the issue.

28th of October, 1831. *Collard* sold 26 puncheons, part of the 44, to the defendant *Kaye*, and delivered to him an invoice with marks and numbers.

31st October, 1831. *Kaye*, between 10 and 12 in the morning, accepted bills for the price, which were duly honoured. On the same morning, the cooper employed by *Kaye* applied at the counting-house of *Yates* for permission

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to cooper and gauge the 26 puncheons, on behalf of *Kaye*, and at about 9 o'clock the same morning, *Yates's* warehouseman accompanied the cooper to the warehouse, when the latter prepared the casks for the gauger, and marked them *J. A. K.* On the same day the gauger gauged the puncheons on behalf of *Kaye*; and on that and the following day, the cooper employed by *Kaye* coopered the casks. The warehouseman of the defendant *Yates* was present nearly all the time of gauging and coopering the puncheons. If the cooper had met with any impediment at *Yates's*, at 9 o'clock on that morning, there would have been time to inform the defendant *Kaye* before he had accepted the bills of *Collard*. When the persons came from defendant *Kaye* to gauge the rums, they were refused three times by a clerk of *Yates*, then *Collard* came and had it done. The coopering, gauging and marking, were done with *Collard's* knowledge and by his permission.

7th September, 1831. *Collard* sold the remaining 18 puncheons to the defendants *Bond* and *Proctor*, and delivered to them an invoice with marks and numbers.

9th September, 1831. The defendants, *Bond* and *Proctor*, settled with *Collard* for these rums. The samples of these 18 puncheons, which were part of the 46 samples which *Collard* kept at *Yates's* counting-house, were taken to *Bond* and *Proctor* after the sale to them.

Out of this lot of 18 puncheons, *Yates* delivered three to *Bond* and *Proctor*, with the assent of *Collard*; viz. one on the 5th October, one on the 1st November, and one on the 8th November, upon separate delivery-orders, signed by *Bond* and *Proctor*, but without any delivery-order from the plaintiffs.

16th November, 1831. The first of the two bills accepted by *Collard* for this rum, became due in London, and was dishonoured, and on the 19th November was returned to and taken up by the plaintiffs. The other bill was also dishonoured when at maturity.

14th November, 1831. *Collard's* insolvency was generally known at Liverpool.

18th November, 1831. The plaintiffs gave notice to *Yates* not to deliver the rum to any person but themselves.

19th November, 1831. The plaintiffs made a verbal demand, and on the 21st November a written demand, of the rum, which *Yates* refused to deliver.

Same day (19th Nov.). *Bond* and *Proctor* presented to the plaintiffs for acceptance, a delivery-order for the remainder of the rum sold to them by *Collard*, as did also *Kaye* for the 26 puncheons sold to him; both of which orders the plaintiffs refused to accept.

21st November, 1831. After the demand by the plaintiffs, they, by the permission of *Yates*, sampled the remaining 41 puncheons.

*Cresswell*, for the plaintiffs. The plaintiffs had the right of possession of these puncheons of rum. As between the plaintiffs and *Yates*, there can be no doubt of their right, unless *Yates* can set up the right of some third person.


First, as to the right of *Collard*. The case shews an assent by *Collard* to the goods continuing in the possession of the plaintiffs until the bills should become due. The goods did remain in their possession, and upon the dishonour of the bills their lien revived. The assent is to be inferred from these circumstances: when *Collard* required a general delivery-order on *Yates*, the plaintiffs refused to give it to him, but said that they had no objection to let him have one or two puncheons if he wanted them: to which *Collard* assented, by taking two orders for the delivery of one puncheon each. *Langfort v. Tiler* (a), *Stevenson v. Blakelock* (b). There is a case in *Dyer* (c), which shews that the plaintiff's right revived upon the dishonour of the bills, and will also serve the plaintiffs, in case it should be contended on the other side that a delivery of part of the goods is in law a delivery of the whole. The delivery of part is not in law a delivery of the whole, unless it be made with the express intention that it shall have that effect. *Bloxam v. Saun-*

(a) 1 Salk. 113. (b) 1 M. & S. 535. (c) Anon. *Dyer*, 29 b.

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*ders* (a), and *Bloxam v. Morley* (b), shew that the purchaser of goods upon credit acquires the right of property and the right of possession; but that such right of possession is not absolute, and may be defeated by the insolvency of the vendee before the possession is actually delivered. Whatever right *Collard* may have had in the intermediate time, he was not entitled to possession after he had become insolvent. Upon the insolvency of *Collard*, the plaintiffs were precisely in the situation alluded to by *Bayley, J.* in *Bloxam v. Saunders*, when he says: "If the seller, in cases of insolvency, has a right to stop the goods in transitu, à fortiori he has a right to hold them, where he has never parted with them, and where no transitus has yet begun." Here no transitus had taken place. In *Bloxam v. Morley*, *Bayley, J.* dwelt on the circumstance that no notice had been given to any of the persons in whose warehouses the goods lay, to transfer them from the name of the vendor into that of the purchaser. So here, *Collard* did not give that notice to *Yates* which he might have given, of his having bought the goods, nor did he get the delivery-orders. The circumstance therefore of the goods having been sold upon credit, does not at all affect the plaintiffs' right, because the possession of the goods was never parted with by the plaintiffs. [*Littledale, J.* The rule as to the delivery of part was laid down in the case of *Bunney v. Pointz* (c).]

The marking and gauging of the puncheons by *Collard* cannot affect the question, because the case shews that it was done privately and without the knowledge of *Yates*; and moreover the marking would not be evidence of a transfer of possession, unless it were done by way of taking

(a) 7 D. & R. 396; 4 B. & C. 941.

(b) 7 D. & R. 407; 4 B. & C. 951.

(c) *Ante*, 1 vol. 231. The Court refused a rule nisi in that case on one point contended for, namely, that the delivery there of a part was in law a delivery of the whole, and took the distinction that in

*Slubey v. Heyward*, 2 II. Bla. 504, and *Hammond v. Anderson*, 1 New Rep. 69, the delivery of part was an *inchoate delivery of the whole*. And see *Walker v. Dixon*, in which the decision at Nisi Prius, 2 Stark. N.P.C. 281, was reversed in banc, Mann. N. P. Dig. 309, pl. 4.

possession, which could not be in this case, inasmuch as it is found that the custom of Liverpool is for the warehouseman not to deliver the goods, unless upon the receipt of a delivery-order; *Hodgson v. Loy* (a), *Baldey v. Parker* (b), *Holderness v. Shackels* (c), *Knowles v. Horsfall* (d). The case states that the plaintiffs left samples with *Collard*, and it will be contended that this delivery of a sample, is in law a delivery of the whole goods sold. But this was not done by way of a delivery to *Collard*; and his subsequently applying for the acceptance of delivery-orders shews that he did not understand that the samples had been given to him with that intention; *Bloxam v. Saunders*, *Cooper v. Elston* (e). In *Slubey v. Heyward* (f), the delivery of a bill of lading to a party who had purchased the goods on credit where a portion of the goods had likewise been delivered to him, was held to be a delivery of the whole, "there appearing no intention, either previously to or at the time of the delivery, to separate part of the cargo from the rest." Here there is an express separation of the two puncheons delivered from the remainder, and from the decision in *Slubey v. Heyward* it may be inferred that the Court would have determined otherwise, if in that case such a separation of the part delivered from the remainder had been shewn; *Hanson v. Meyer* (g).

With respect to the sub-vendees under *Collard*, it is submitted that they cannot be in a better condition than the person from whom they purchased.

I. As to *Kaye*. He knew that the rum was bonded by *Yates* in his own warehouse. A prudent man would have gone to *Yates* and have inquired into the circumstances, and then he would have found that *Collard* was not in a situation to give a delivery-order. His suspicions should also have been awakened by the circumstance, that when he sent a person to mark and gauge the puncheons, *Yates's*

(a) 7 T. R. 440.

(b) 2 B. &amp; C. 37.

(c) 3 M. &amp; R. 25; 8 B. &amp; C. 612.

(d) 5 B. &amp; Ald. 134.

(e) 7 T. R. 14.

(f) 2 H. Bla. 504.

(g) 6 East, 614.

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clerk refused to allow it to be done, until *Collard*, who was also a clerk, over-ruled this refusal. The plaintiff had no notice of this marking and gauging, and never assented to it. Whatever title therefore this may give him against *Collard*, it cannot affect the plaintiffs.

II. As to *Bond* and *Proctor*. They bought eighteen puncheons of this rum, and took the samples that had been delivered to *Collard*. If, however, the delivery of the samples did not pass the rum to *Collard*, neither could it have any effect with these under-purchasers. These two defendants, who knew the custom of the trade, presented the delivery-order at the time when the dispute had arisen concerning the right to the possession of the rum. The marking and gauging by *Bond* and *Proctor* was not done with the knowledge of the plaintiffs. In *Stoveld v. Hughes (a)*, the marking of the goods was held to transfer the property, but that was done in the presence of the original vendor. In *Chaplin v. Rogers (b)*, there had been a delivery of part by the vendor himself. If it be said that the plaintiffs enabled *Collard* to deceive others, and ought to be answerable to those persons, the answer is, that this could not be the case so long as it was known that the goods could not be taken from *Yates's* warehouse without a delivery-order from the plaintiffs. *Zwinger v. Samuda (c)*, which may be relied on, is wholly different from the present case. To establish any resemblance, it should have been proved that in this case the plaintiffs had given a delivery-order to *Collard*, which he had shewn and transferred to the sub-purchasers. But here the invoice is all that was handed over.

But *Yates* held these goods as agent to the plaintiffs, whose title therefore he is estopped from denying.

*Wightman*, for the defendant *Kaye*. As the purchaser of 26 puncheons, *Kaye*, and not the plaintiffs, is entitled to recover against *Yates*. Both *Kaye* and the plaintiffs have

(a) 14 East, 308.

(b) 1 East, 192.

(c) 7 Taunt. 265; 1 B. Moore,

12; Holt, N. P. C. 395. And

see *Keyser v. Suse*, Gow, N. P. C.

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paid for the goods. *Kaye* has the same right of property as *Collard*, with this difference, that *Collard* having dishonoured the bills, the plaintiffs would be allowed to detain the goods as against him, but as against *Kaye*, who is a purchaser who has paid the purchase money, the right of the plaintiffs, who merely buy and sell the same day, is gone. All the acts of ownership are exercised by *Collard* and by *Kaye*. It is the usage of the trade, when a sale is effected, to take samples and cooper the casks. This was done by *Collard*. The goods are bought by *Collard*, who pays for them by bills, which are negotiated by the plaintiffs; and therefore, at the time of the sale by *Collard* to *Kaye*, the plaintiffs stood in the situation of paid vendees, and had no lien on the goods; *Horncastle v. Farran* (a). No subsequent act or default of the plaintiffs or of *Collard*, could defeat the right *Kaye* then acquired. All that is shewn by the limited delivery-orders is, that as between the plaintiffs and *Yates* it was not the custom to issue general delivery-orders. It does not appear that the plaintiffs refused to let *Collard* have two or three puncheons at a time. They could not refuse. If they had refused to give a delivery-order whilst the bills were outstanding, *Collard* might have brought an action against them. *Kaye* exercised all due caution. Upon entering into the treaty for the purchase, and before he had delivered the bills, he sent to the warehouse to mark and gauge the puncheons. It has been suggested that there was a degree of incaution on the part of *Kaye*; that he ought to have inquired of *Yates* whether the goods had been sold to *Collard*. Supposing he had done so, *Yates* would have referred him to *Collard*; *Collard* would have shown him the plaintiff's invoice, from which it would have appeared that he had bought and paid for the goods. *Kaye* had every reason to suppose that *Collard* had jus disponendi. *Davis v. Reynolds* (b) shews that if the original vendor chooses to give credit by taking bills, he gives his

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(a) 3 B. & Ald. 497.

(b) 4 Campb. 267; S. C. 1 Stark. N. P. C. 115.

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vendee such a *ius disponendi* as enables him to sell to an innocent vendee. [*Parke, J.* That is qualified in the report of the case in *Starkie* by these words, "unless the bill has been dishonoured."] It would be dangerous if any other doctrine than that which is now contended for were established. *Kaye* did every thing in his power to secure himself; and *Collard* was the clerk to *Yates*, the warehouseman and agent of the plaintiffs, as well as himself the vendor. If either party is to sustain a loss, it should be the party whose conduct in giving credit to a second party has enabled him to sell to a third person, by whom he is actually paid. The plaintiffs themselves do not touch the goods, but leave them at the warehouse of *Yates*, from whom they purchased. [*Parke, J.* They touch them just as much as if they had bought them from third persons, had paid for them, and had delivered them to *Yates*, and had lodged with him the delivery-order, with an understanding that *Yates* was to retain them for the use of the plaintiffs.] There was no actual delivery. [*Parke, J.* There was enough to pass the property.] Undoubtedly there was; but the plaintiffs had transferred the right of property to *Collard*, who therefore, whilst the bills remained not dishonoured, had a right to sell to others. [*Patteson, J.* Have you seen the case of *Craven v. Rider*? (a) In that case the original vendor sold upon credit at two months.] If however *Kaye* has no remedy as against the plaintiffs, yet *Yates* surely must be liable to him. *Yates* employed *Collard* in a double capacity; so that purchasers were led to suppose that *Yates* held on behalf of *Collard*, and afterwards allowed *Kaye* to exercise acts of ownership, so as to amount to an acknowledgment that he held on behalf of *Kaye*, when he might have told *Kaye* what was the true state of the case; *Yates* therefore cannot be himself in a position to set up the *ius tertii*. *Kaye* is placed in such a position by the acts and omissions of others, that it would be much to be regretted if he should be found to have no remedy.

(a) 6 Taunt. 433; 2 Marsh. 127.

*Rescoe*, for *Bond* and *Proctor*. It is admitted that at the time of the sale to *Collard* the right of property and the right of possession passed to him, and these rights passed to *Bond* and *Proctor* also, they having paid *Collard* and standing in his place. With regard to the right of lien reviving upon the nonpayment of the bills, this is merely an equitable lien, founded upon equitable principles, and subject to equitable rules. There is no express authority upon this point, but many are to be found upon the right of stoppage in transitu, which is similar to the right of lien. In *Lickbarrow v. Mason*(a), Mr. J. Buller says, "The right of seizing in transitu is founded on equity: no case in equity has ever suffered a man to seize goods in opposition to one who has obtained a legal title, and has advanced money upon them. Lord Hardwicke's opinion was clearly against it; and the law, where it adopts the reasoning and principle of a court of equity, never has exceeded, and never ought to exceed, the bounds of equity itself." In *Ellis v. Hunt*(b), the same learned judge says, "The right of the vendor to seize goods in transitu is founded upon equitable principles. It is a right with which he is indulged on principles of justice, originally established in courts of equity, and since adopted in courts of law." In *Hodgson v. Loy*(c), Lord Kenyon expressed a similar opinion. Other authorities are to be found upon the same point. There is a summary of the cases in *Bell's Commentaries* on the Laws of Scotland (d), and it is there said that the history of the doctrine, as it made its way in England, tends strongly to prove that the privilege of stopping in transitu is entirely founded on equity, and that this supposition affords a more simple and satisfactory principle for regulating the questions that have occurred in this department. If then the right of lien, upon the dishonour of the bills, is founded upon equitable principles, it becomes necessary to inquire how those principles apply to the present case. Upon

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(a) 6 East, 20, in notis.

(c) 7 T. R. 445.

(b) 8 T. R. 669.

(d) 3d edit. p. 98, et seq.

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the common principles of equity, it is not difficult to say whether the vendor, giving credit to another party and transferring to him the right of property and the right of possession, or an innocent sub-purchaser for value, is entitled to the preference. In *Lempriere v. Pasley* (a), *Ashhurst*, J. says, "As between a person who has an *equitable lien* and a third person who purchases the thing for a valuable consideration and without notice, the prior equitable lien shall not overreach the title of the vendee." *Snee v. Prescott* (b). In *Kinloch v. Craig* (c), *Eyre*, C. B., says, "The right of stopping in transitu was out of the question, that never occurring but as between the vendor and vendee." The summary also of what *Buller*, J. says in *Lickbarrow v. Mason* is, that the right of stoppage in transitu only exists as between vendor and vendee. In *Hawes v. Watson* (d), *Bayley*, J. says, "This appears to me very different from the ordinary case of vendor and vendee. In such cases justice requires that the vendee shall not have the goods unless he pays the price: if he cannot pay the price, the vendor ought to have his goods back. But if the question arises, not between the original vendor and the original vendee, but between the original vendor and a purchaser from the vendee, that purchaser having paid the full price for the goods, what is the honesty, and justice, and equity of the case? Surely that the sub-vendee, who has paid the price, should be entitled to the possession of the goods. No case can be found which has in terms decided the point now before the Court, but the principle is to be found in *Lickbarrow v. Mason*, where it was decided that the vendor having in his possession the bill of lading indorsed in blank by the vendor, indorsing and delivering it to a third person for a valuable consideration, and without notice of the non-payment, the right of the vendor to stop the goods in transitu was thereby divested as against such bonâ fide holder of the bill. The principle there settled was, that the delivery of

(a) 2 T. R. 490.

(c) 3 T. R. 787.

(b) 1 Atk. 245.

(d) 2 B. &amp; C. 542; 4 D. &amp; R. 22.

the symbol was evidence of the transfer of the property. In *Green v. Haythorne* (a), goods had been sold by A. to B., to be paid for by B.'s acceptance of a bill to be drawn by A. The goods were weighed, and remained in the warehouse of A., who neglected to draw the bill. B. was furnished by A. with an invoice and samples, and resold a portion of the goods to C., who paid for them and transmitted B.'s order for the delivery of the goods to A. On the fourth day after A.'s receipt of the order, B. became bankrupt, and then A. refused to deliver the goods to C., insisting that he had a lien upon them for the purchase money. B. had also sold other portions of these goods to other persons, to whom A. had delivered the goods from time to time. It was held, that under these circumstances C. could maintain trover for the goods against A. The case as to *Bond* and *Proctor* resembles that of *Green v. Haythorne*, from the circumstance of a delivery by the plaintiffs of the two puncheons to another purchaser from *Collard*. The present case is even stronger, because here a bill was actually delivered to the vendor. *Green v. Haythorne* came again before the Court upon a motion for a new trial (b), which the Court refused to grant, on the ground of laches on the part of the original vendor. Upon this view also of the case, *Green v. Haythorne* is an authority in favour of *Bond* and *Proctor*. It was the duty of the plaintiffs to give to the under-purchasers notice of the insolvency of *Collard* as soon as it became known to them. This, however, they neglected to do. The insolvency of *Collard* must have been known to *Yates* on the 1st and on the 8th of November, when he delivered the two puncheons to *Bond* and *Proctor*, and he should on those occasions have made them acquainted with the circumstances. [Parke, J. You treat *Yates* as the agent of the plaintiffs.] He held the goods as agent to some person;—either as agent to the plaintiffs, in which case he has been guilty

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(a) 1 Stark. N. P. C. 447.

(b) Ibid. 450.



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of laches which must affect them, or as agent to *Bond* and *Proctor*, in which case the possession is in these sub-vendees, and therefore their title was perfect.

The part-delivery takes from the vendor his right to stop in transitu. There is a prevailing idea current in the profession, that a delivery of part does not put an end to the lien(a), but this is not supported by any case. In *Hanson v. Meyer*(b) and *Bloxam v. Saunders*(c), something remained to be done before the right of possession vested in the purchaser. In *Stoveld v. Hughes*(d), Lord *Ellenborough*, in the course of the argument, says, "I presume that the cases of *Hodgson v. Loy* and *Hanson v. Meyer*, will be cited by the defendant's counsel, to shew that a part payment for or part-delivery of goods will not divest the vendor's right to stop the goods in transitu, or their lien on the remainder; but in the one there was no possession taken by the vendee, and in the other something more remained to be done before the contract was complete." This shewed that his opinion was, that a delivery of part destroyed the lien. In *Simmons v. Swift*(e), *Littledale, J.* says, "This differs from the cases of lien or stoppage in transitu, in which it may be considered that a delivery of part is in the nature of a waiver of the lien or right to stop in transitu." The same doctrine is also recognized by *Bayley, J.* in *Crawshay v. Eades*(f). A contract cannot in law be divided. If the party chooses to put a part of it in execution, he cannot put an end to it as to the remainder.

With respect to the acts of ownership over these goods, it is to be observed that they are exercised nearly all by the purchasers. The absence of the delivery-order does not affect the question, as that is merely evidence. Any

(a) *Vide Walker v. Dixon*, as reported, Mann. N. P. D. 309, pl. 4.

(b) 6 East, 614.

(c) 7 Dowl. & Ryl. 396; 4 Barn. & Cres. 941; *ante*, 181, 183.

(d) 14 East, 313.


(e) 5 Barn. & Cres. 857; 8 Dowl. & Ryl. 693.

(f) 1 B. & C. 183; 2 D. & R. 288. And see *Oxendale v. Wetherell*, 4 Mann. & Ryl. 429.

other circumstance which shews that the seller has abandoned the possession, is equivalent to a delivery-order; as a delivery of the key of the vendor's warehouse to the purchaser, the packing or unpacking of the goods by him. The case of *Ellis v. Hunt* (a) is strictly in point. Here, from the moment when *Collard* was permitted to mark the goods with his name, *Yates* became his agent; *Foster v. Frampton* (b).

With reference to the question whether the plaintiffs had enabled *Collard* to commit a fraud, *Hawes v. Watson* (c) should be mentioned, where *A.* sold tallow to *B.* and gave a written order upon the wharfingers to weigh, deliver, transfer and rehouse the same, and *B.* having contracted to sell to *C.*, obtained from the wharfingers a written acknowledgment that they had transferred the tallow to the account of *C.*, and that *C.* was to be liable to the charges from a given date; the Court held, that upon the insolvency of *B.*, *C.* might maintain trover against the wharfingers, and that after this acknowledgment that they held as agents of *C.*, they could not set up the lien of *A.* *Craven v. Ryder* has been cited. That case, however, turned upon the particular circumstances. [*Parke, J.* You appear to have done nothing to take possession.] It is sufficient to shew that *Collard* had done that which divested the plaintiff's right of lien, and that he sold to these defendants before his insolvency or the dishonour of his bills.

*Cowling*, for the defendant *Yates*. *Yates* knew nothing of the transaction between *Collard* and the plaintiffs or his (*Yates's*) co-defendants. If the rum had been in the plaintiffs' actual possession, they would, by their sale to *Collard*, have passed away their right of property and of possession. The same result must follow here even as regards *Yates*; because although an agent cannot set up against his principal the title of another who makes no claim on him, it is a

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(a) 3 T. R. 464.

(b) 6 Barn. & Cres. 107.

(c) 2 Barn. & Cres. 540; 4.  
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general rule that he may if such a claim be made. It is like the case of a tenant, who under such circumstances is not estopped from denying his landlord's title. *Pope v. Biggs* (a), *Wilson v. Anderton* (b). The authorities even go so far as to shew that in such a case the agent may set up the title of the stranger, even though he himself has promised to deliver according to his employer's directions. *Syeds v. Hay* (c) was an action of trover, brought by the owner of goods against the captain of the vessel in which they had been shipped. The plaintiff, intending to take the goods from the ship himself, directed the defendant not to land them on a wharf against which the vessel was moored, which the defendant promised not to do, but nevertheless did, supposing that the wharfinger had a lien for wharfage. *Buller, J.* said, "If the wharfage duty be due, that will be an answer to the present action." Lord *Tenterden*, in *Howard v. Tucker* (d), held, that under such circumstances the agent was in the same situation as the person making the claim. So, per *Parke, J.*, in *Brandt v. Bowley* (e). It would be singular if it were not so; for an agent cannot defend himself under shelter of his principal from delivering goods to the person who has a right to them; and if that person recovered against him, he might recover over under the implied contract of indemnity against his principal, which would only produce circuity of action. This general rule is not varied here either by any particular mode of dealing between the plaintiffs and *Yates*, or by any usage of Liverpool. In all the previous dealings, it appears that the plaintiffs coopered and looked after the rums which they left at *Yates's*; and the usage is not applicable, for that is confined to cases where persons deposit their rums in the bonded warehouses. Here, the plaintiffs did not do so. But, supposing the usage to be applicable, then it is equally so to the plaintiffs themselves, and shews that they never

(a) 4 Mann. &amp; Ryl. 193; 9

Barn. &amp; Cres. 245.

(b) 1 Barn. &amp; Adol. 450.

(c) 4 T. R. 260.

(d) 1 B. &amp; Adol. 712.

(e) 2 B. &amp; Adol. 932.

obtained the right of possession, but merely the right of having a delivery-order accepted, and there is nothing to shew that they might not pass away that right without a delivery-order. A usage by which the plaintiffs could not part with their right of possession without giving a delivery-order, would be bad in law, since it would put the agent in a different position, as regards the world, from his principal: *Todd v. Reid* (a). Such a usage should be construed strictly; it should have been expressly found to have that effect; but the case merely states that *in practice* a delivery-order is used, and is silent as to its necessity. A delivery-order is not like a dock-warrant. A dock-warrant is a symbol of property, which it passes, as a bill of exchange does a right to money. It is of a complex form and negotiable. A delivery-order has none of these qualities. It is a mere direction to a warehouseman, who keeps it, and orders his clerk to let the person who brought it have the goods, and then it is *functus officio*. It is never used unless the goods are wanted out; it is not filed in the warehouseman's office as a record of the property. Suppose the plaintiffs had verbally authorized *Yates* to deliver the goods, and a delivery had taken place accordingly, could they afterwards have maintained trover against him on the ground that they had given him no written delivery-order? In *Knowles v. Horsefall* (b), which was trover against the assignees of the vendor of a quantity of brandy, which had been suffered by the plaintiff, the vendee, to remain in the custody of the warehouseman, the custom relative to the delivery-order was more fully proved than it has been here, yet Lord *Tenterden* said, "If the plaintiff had given notice of the sale to the warehouse-keeper, the latter would not then have been justified in delivering them to any other order than that of the plaintiff: but not having received any such notice, the warehouse-keeper would have been justified in delivering them to the order of the vendor

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(a) 4 B. &amp; Ald. 210.

(b) 5 B. &amp; Ald. 134.

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who had placed them there." The history of delivery-orders seems to be this. On sales of goods lying in a warehouse, the warehouseman might have difficulty in knowing to whom to deliver, and the best evidence would be the production, by the person claiming them, of an order for delivery, signed by the person who deposited them in the warehouse. It became therefore usual for the warehouseman to require such an order to be shewn him. Thus the usage is solely for the advantage of the warehouseman, which, if he pleases, he may waive; and if he be fully aware of a change of property, not only may he deliver without a delivery-order, but it is his duty to do so.

Supposing *Yates* to be not estopped from contending that the plaintiffs had once parted with the right of property and of possession, that right has never revived; since the right of stoppage in transitu is gone on several grounds. *Davis v. Reynolds* (a) shews that the co-defendants having become purchasers at the time that the plaintiffs' right of possession was suspended, it was thereby extinguished. *Craven v. Ryder* (b), turned on the receipt which the mate had given, but for which circumstance the judgment of Lord *Tenterden*, in the later case of *Ruck v. Hatfield* (c), shews that the decision would have been different. Also the delivery of the samples extinguished that right. A delivery of part is delivery of the whole, so as to put an end to a right of stoppage in transitu; and in the cases apparently at variance, something remained to be done to the residue; *Slubey v. Hayward* (d), *Chaplin v. Rogers* (e) per *Bayley, J.* *Crawshay v. Eades* (f). A fortiori where the part delivered consists of samples, as here, *Hinde v. Whitehouse* (g). The object of delivering samples must be, that the possessor may carry them into the market, and thereby represent to the world that he is enabled to dispose

(a) 1 Stark. N. P. C. 115; 3 C. 4  
 Campb. 267.

(b) 6 Taunt. 433; 2 Marsh. 127.

(c) 5 B. & Ald. 632.

(d) 2 H. Bla. 504.

(e) 1 East, 192.

(f) 1 Barn. & Cress. 181; 2

Dowl. & Ryl. 288.

(g) 7 East, 558.

of the bulk of which he exhibits the samples. The samples must have been taken by virtue of 32 Geo. 2, c. 29, s. 1, and would therefore be taken from the bulk in the presence of an officer of excise. In *Footer v. Frampton* (a), Lord *Tenterden* said "The warehouse of the carrier was, I think, the warehouse of the bankrupt, exclusive of the circumstance of the samples being taken, which is a fact relied on in one of the cases (b); I am therefore of opinion that the transitus was at an end." In *Cooper v. Elstone* the samples delivered formed no part of the wheat sold. Nor does it appear that in *Bloxam v. Morley* the samples were parcel of the bulk. The marking also extinguished the right, and from that time *Yates* became *Collard's* agent, and held on his account, per Lord *Ellenborough*, in *Stoveld v. Hughes* (c), *Ellis v. Hunt* (d). *Hodgson v. Loy* (e) may seem contrary, but in that case the goods were marked *before* they reached their terminus, which they never did reach; and therefore it does not impeach the conclusion that a marking by a vendee of goods in the actual possession of a warehouseman, as was the case here, has the effect of transferring the possession to the vendee. But, independently of these grounds, the plaintiffs are estopped from claiming the rums as against *Yates*, since by giving *Collard* an unqualified receipt, and by suffering him to cooper and mark and act as owner, they have put it in his power to commit a fraud on *Yates* and on the world. If *Yates* had so acted he would have been estopped, *Hawes v. Watson* (f); and the same rule should be acted on for, as well as against a warehouseman. It is not found that *Yates* allowed *Collard* to use his warehouse as his own. The plaintiffs are rather to be considered as the agents of *Collard*, than *Collard* as the agent of *Yates*. On three several occasions they purchased

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(a) 2 Carr. & Payne, 470; 6 B. & C. 107.

(b) Probably *Green v. Haythorne*, 1 Stark. N. P. C. 447, ante, 189, is the case here alluded to.

(c) 14 East, 308.

(d) 3 T. R. 464.

(e) 7 T. R. 440.

(f) 2 B. & C. 540; 4 D. & R. 22.

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of *Yates*, and resold at an advance (a), the same day, to *Collard*. They must have purchased in the character of *Collard*'s agents, otherwise why should *Yates*, who knew what *Collard* dealt in such articles, have been kept in the dark as to these transactions? *Collard* is to be considered as their unknown principal, and they are bound by his acts.

But the plaintiffs should have exercised their right of stoppage, if it existed, within a reasonable time; *Green v. Haythorne*. *Collard*'s credit was bad with them from the 5th October. If they had then given *Yates* notice, almost all the inconvenience which has followed would have been avoided. They did not even take the slightest notice when *Collard*'s first bill was dishonoured on the 29th October, but waited three weeks without asserting their right. *Yates* had no knowledge of the two delivery-orders given by the plaintiffs. The plaintiffs' object appears to have been to deliver to *Collard* the symbols of property, in order that he might go into the market, and by reselling the goods, be enabled to pay them the advanced price at which they had sold to him; if not, they hoped by keeping back delivery-orders to retain their hold of *Yates*, and, by this ingenious scheme, to secure their own interest in either event.

But supposing the plaintiffs to be entitled to recover any portion as against *Yates*, then as to so much *Yates* ought to be exonerated from his co-defendants. They must have known that *Collard* was not the importer, and ought to have made inquiries of *Yates*. If the marking and the other circumstances should be considered as not vesting the actual possession in the co-defendants, and thereby barring the right of stoppage in transitu, then it must follow that the defendants never obtained possession; and *Knowles v. Horsfall* shews that they never acquired the reputed ownership. *Yates* cannot be estopped as to them, for he was ignorant of their acts; nor can he be considered as to them the principal of *Collard*, for they dealt with *Collard* on his own account, and not as agent. The Ware-

(a) This is not stated in the case *ante*, 177.

housing Act(a), requires the custom house officer, who has the superintendence of a bonded warehouse, to keep a transfer-book, which may be inspected. Inquiry should have been made of him. *Yates* kept no transfer-books, nor was he bound to do so. *Bond* and *Proctor* did no act besides receiving samples. *Kaye's* purchase is suspicious. From the date it appears to have been made when *Collard* was endeavouring to raise money to take up the bill which became due on the 29th October. On calculation it will appear that *Kaye* bought at extraordinarily low prices. He did not pay *Collard* until after his men had been refused access to *Yates's* warehouse three times, and after they had obtained admission only by means of *Collard*. There was time enough for *Kaye* to have obtained information of this before the payment took place. The payment, therefore, was made in his own wrong.

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*Cresswell* in reply. If the argument of Mr. *Cowling* were good, *Yates* would be entitled to retain the goods to his own use. It is said that the plaintiffs enabled *Collard* to commit a fraud, by giving him the invoice and enabling him to enter his master's warehouse to mark the goods; but it should rather be said that *Yates* enabled *Collard* to commit a fraud by entrusting to him the whole management of his warehouse, and giving him such authority that he could admit others to cooper and gauge in his master's warehouse, even in defiance of the other clerks. Here it is said that what is an estoppel to the warehouseman estops the principal; but this is not so. If *Yates* had agreed to hold the property for *Kaye*, *Bond*, and *Proctor*, without the authority of his principal, that could not estop the principal. Then it is said that the plaintiffs are estopped by having given to *Collard* the invoice, which it is urged is a symbolical delivery of the goods sold. But in *Snee v. Prescott* (b), it was held that the invoice was not a symbol

(a) 6 Geo. 4, c. 112, s. 9.

(b) 1 Atk. 245.



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of property. A party cannot be bound by the delivery of the invoice. The taking of the samples is also relied on. In the cases cited upon this point, it was expressly agreed that the samples should be considered as symbols of the property. Here that was not so; indeed the sample was not a part of the property, for that which was sold was what remained after the samples had been taken. The case of *Craze v. Ryder* has been attempted to be distinguished. *Yates*, however, was in the same condition as the person who gave the receipt, in that case, and, according to the custom, could not transfer the possession from the plaintiffs to another, unless authorized by a delivery-order. It is said that the cases are different, because there the goods had not arrived at the terminus, whereas in this case the warehouse is to be considered as the terminus. This is contrary to the principle laid down in *Bloxam v. Saunders*.

With regard to the sub-vendees it is quite clear that the vendor cannot transfer to another a better right than he himself has. This differs from the case of a transfer of a negotiable instrument, where a person who has no right may give a right to an innocent transferee, because a holder need not trace his title to a note through all the intermediate parties, but may strike out the names of any of the indorsers (a). [*Littledale, J.* A bill of lading is also different.] That is a symbol of property. *Kaye, Bond and Proctor* could have no better right than *Collard*. *Horn-castle v. Ferrand* shews, that while the bill is running the lien of the vendors is suspended, but the case from *Dyer's Reports*, and *Bloxam v. Morley*, and *Bloxam v. Saunders* shew that the lien revives upon the dishonour of the bill or insolvency of the vendee. In this case the bill was

(a) i.e. where there is a prior blank indorsement. But even where the indorsements are special, and the holder is bound to trace his title through all the in-

dorsers, if he be an indorser for value before the bill is due, he is not affected by any defects in the title of a prior holder of which he has no notice.

taken up, and *Collard's* insolvency known to the plaintiffs, and consequently their lien had revived before any demand was made by the sub-vendees. In *Davis v. Reynolds* it does not appear that the bill had ever been dishonoured. Mr. *Roscoe* has relied upon the equitable nature of the right of stoppage in transitu; but though stoppage in transitu was first instituted in equity, it has been adopted by the law, and therefore is subject to legal rules. Upon the dishonour of the bills the party has the legal right of property and of possession. In *Lickbarrow v. Mann* the symbol of property was delivered. In *Green v. Haythorne* the Court decided on the ground of laches in the defendant. Here the plaintiffs refused to deliver more than one or two puncheons, and the whole of the remainder continued in the hands of the vendor by the assent of the vendee. In *Stoveld v. Hughes* the vendor had assented to the marking and had assented to the resale, and therefore he was estopped from denying the right of the sub-vendees. Here the acts done by coopering, gauging and marking were done only on the authority of the first vendee.

DENMAN, C. J.—In this case it appears that the plaintiffs purchased rums lying in the warehouse of *Yates*, and paid for them, and thus became the absolute possessors of the property. They sold a portion of the rums to *Collard*, who was clerk to *Yates*, and who paid for them by bills which were dishonoured, one of them before any demand of possession was made. The question is, whether any thing was done which had the effect of divesting the plaintiffs of the property in the goods. Whilst the bills were running *Collard* had the power to take the rums into his own possession, or he might sell to others, who would also have a right to take possession of them. But he did not, as it appears, take such steps as were necessary for the exercise of that right, because it is found that it is the custom in Liverpool for the warehousemen not to deliver the possession of goods except upon the receipt of a deli-

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of laches which must affect them, or as agent to *Bond* and *Proctor*, in which case the possession is in these sub-vendees, and therefore their title was perfect.

The part-delivery takes from the vendor his right to stop in transitu. There is a prevailing idea current in the profession, that a delivery of part does not put an end to the lien(a), but this is not supported by any case. In *Hanson v. Meyer*(b) and *Bloram v. Saunders* (c), something remained to be done before the right of possession vested in the purchaser. In *Stoveld v. Hughes*(d), Lord *Ellenborough*, in the course of the argument, says, "I presume that the cases of *Hodgson v. Loy* and *Hanson v. Meyer*, will be cited by the defendant's counsel, to shew that a part payment for or part-delivery of goods will not divest the vendor's right to stop the goods in transitu, or their lien on the remainder; but in the one there was no possession taken by the vendee, and in the other something more remained to be done before the contract was complete." This shewed that his opinion was, that a delivery of part destroyed the lien. In *Simmons v. Swift* (e), *Littledale, J.* says, "This differs from the cases of lien or stoppage in transitu, in which it may be considered that a delivery of part is in the nature of a waiver of the lien or right to stop in transitu." The same doctrine is also recognized by *Bayley, J.* in *Crawshay v. Eades*(f). A contract cannot in law be divided. If the party chooses to put a part of it in execution, he cannot put an end to it as to the remainder.

With respect to the acts of ownership over these goods, it is to be observed that they are exercised nearly all by the purchasers. The absence of the delivery-order does not affect the question, as that is merely evidence. Any

(a) *Vide Walker v. Dixon*, as reported, Mann. N. P. D. 309, pl. 4.

(b) 6 East, 614.

(c) 7 Dowl. & Ryl. 396; 4 Barn. & Cres. 941; *ante*, 181, 183.

(d) 14 East, §13.

(e) 5 Barn. & Cres. 857; 8 Dowl. & Ryl. 693.

(f) 1 B. & C. 183; 2 D. & R. 288. And see *Oxendale v. Wetherell*, 4 Mann. & Ryl. 429.

other circumstance which shews that the seller has abandoned the possession, is equivalent to a delivery-order; as a delivery of the key of the vendor's warehouse to the purchaser, the packing or unpacking of the goods by him. The case of *Ellis v. Hunt* (a) is strictly in point. Here, from the moment when *Collard* was permitted to mark the goods with his name, *Yates* became his agent; *Foster v. Frampton* (b).

With reference to the question whether the plaintiffs had enabled *Collard* to commit a fraud, *Hawes v. Watson* (c) should be mentioned, where *A.* sold tallow to *B.* and gave a written order upon the wharfingers to weigh, deliver, transfer and rehouse the same, and *B.* having contracted to sell to *C.*, obtained from the wharfingers a written acknowledgment that they had transferred the tallow to the account of *C.*, and that *C.* was to be liable to the charges from a given date; the Court held, that upon the insolvency of *B.*, *C.* might maintain trover against the wharfingers, and that after this acknowledgment that they held as agents of *C.*, they could not set up the lien of *A.* *Craven v. Ryder* has been cited. That case, however, turned upon the particular circumstances. [*Parke, J.* You appear to have done nothing to take possession.] It is sufficient to shew that *Collard* had done that which divested the plaintiff's right of lien, and that he sold to these defendants before his insolvency or the dishonour of his bills.

*Cowling*, for the defendant *Yates*. *Yates* knew nothing of the transaction between *Collard* and the plaintiffs or his (*Yates's*) co-defendants. If the rum had been in the plaintiffs' actual possession, they would, by their sale to *Collard*, have passed away their right of property and of possession. The same result must follow here even as regards *Yates*; because although an agent cannot set up against his principal the title of another who makes no claim on him, it is a

(a) 3 T. R. 464.

(b) 6 Barn. &amp; Cres. 107.

(c) 2 Barn. &amp; Cres. 540; 4 Dowl. &amp; Ry. 22.

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general rule that he may if such a claim be made. It is like the case of a tenant, who under such circumstances is not estopped from denying his landlord's title. *Pope v. Biggs (a)*, *Wilson v. Anderton (b)*. The authorities even go so far as to shew that in such a case the agent may set up the title of the stranger, even though he himself has promised to deliver according to his employer's directions. *Syeds v. Hay (c)* was an action of trover, brought by the owner of goods against the captain of the vessel in which they had been shipped. The plaintiff, intending to take the goods from the ship himself, directed the defendant not to land them on a wharf against which the vessel was moored, which the defendant promised not to do, but nevertheless did, supposing that the wharfinger had a lien for wharfage. *Buller, J.* said, "If the wharfage duty be due, that will be an answer to the present action." Lord *Tenterden*, in *Howard v. Tucker (d)*, held, that under such circumstances the agent was in the same situation as the person making the claim. So, per *Parke, J.*, in *Brandt v. Bowley (e)*. It would be singular if it were not so; for an agent cannot defend himself under shelter of his principal from delivering goods to the person who has a right to them; and if that person recovered against him, he might recover over under the implied contract of indemnity against his principal, which would only produce circuity of action. This general rule is not varied here either by any particular mode of dealing between the plaintiffs and *Yates*, or by any usage of Liverpool. In all the previous dealings, it appears that the plaintiffs coopered and looked after the rums which they left at *Yates's*; and the usage is not applicable, for that is confined to cases where persons deposit their rums in the bonded warehouses. Here, the plaintiffs did not do so. But, supposing the usage to be applicable, then it is equally so to the plaintiffs themselves, and shews that they never

(a) 4 Mann. & Ryl. 193; 9  
Barn. & Cres. 245.

(b) 1 Barn. & Adol. 450.

(c) 4 T. R. 260.

(d) 1 B. & Adol. 712.

(e) 2 B. & Adol. 932.

obtained the right of possession, but merely the right of having a delivery-order accepted, and there is nothing to shew that they might not pass away that right without a delivery-order. A usage by which the plaintiffs could not part with their right of possession without giving a delivery-order, would be bad in law, since it would put the agent in a different position, as regards the world, from his principal: *Todd v. Reid* (a). Such a usage should be construed strictly; it should have been expressly found to have that effect; but the case merely states that *in practice* a delivery-order is used, and is silent as to its necessity. A delivery-order is not like a dock-warrant. A dock-warrant is a symbol of property, which it passes, as a bill of exchange does a right to money. It is of a complex form and negotiable. A delivery-order has none of these qualities. It is a mere direction to a warehouseman, who keeps it, and orders his clerk to let the person who brought it have the goods, and then it is *functus officio*. It is never used unless the goods are wanted out; it is not filed in the warehouseman's office as a record of the property. Suppose the plaintiffs had verbally authorized *Yates* to deliver the goods, and a delivery had taken place accordingly, could they afterwards have maintained trover against him on the ground that they had given him no written delivery-order? In *Knowles v. Horsefall* (b), which was trover against the assignees of the vendor of a quantity of brandy, which had been suffered by the plaintiff, the vendee, to remain in the custody of the warehouseman, the custom relative to the delivery-order was more fully proved than it has been here, yet Lord *Tenterden* said, "If the plaintiff had given notice of the sale to the warehouse-keeper, the latter would not then have been justified in delivering them to any other order than that of the plaintiff: but not having received any such notice, the warehouse-keeper would have been justified in delivering them to the order of the vendor

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(a) 4 B. &amp; Ald. 210.

(b) 5 B. &amp; Ald. 134.

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who had placed them there." The history of delivery-orders seems to be this. On sales of goods lying in a warehouse, the warehouseman might have difficulty in knowing to whom to deliver, and the best evidence would be the production, by the person claiming them, of an order for delivery, signed by the person who deposited them in the warehouse. It became therefore usual for the warehouseman to require such an order to be shewn him. Thus the usage is solely for the advantage of the warehouseman, which, if he pleases, he may waive; and if he be fully aware of a change of property, not only may he deliver without a delivery-order, but it is his duty to do so.

Supposing *Yates* to be not estopped from contending that the plaintiffs had once parted with the right of property and of possession, that right has never revived; since the right of stoppage in transitu is gone on several grounds. *Davis v. Reynolds* (a) shews that the co-defendants having become purchasers at the time that the plaintiffs' right of possession was suspended, it was thereby extinguished. *Craven v. Ryder* (b), turned on the receipt which the mate had given, but for which circumstance the judgment of Lord *Tenterden*, in the later case of *Ruck v. Hatfield* (c), shews that the decision would have been different. Also the delivery of the samples extinguished that right. A delivery of part is delivery of the whole, so as to put an end to a right of stoppage in transitu; and in the cases apparently at variance, something remained to be done to the residue; *Slubey v. Hayward* (d), *Chaplin v. Rogers* (e) per *Bayley, J.* *Crawshay v. Eades* (f). A fortiori where the part delivered consists of samples, as here, *Hinde v. Whitehouse* (g). The object of delivering samples must be, that the possessor may carry them into the market, and thereby represent to the world that he is enabled to dispose

(a) 1 Stark. N. P. C. 115; 3 C. 4  
Campb. 267.

(b) 6 Taunt. 433; 2 Marsh. 127.

(c) 5 B. & Ald. 632.

(d) 2 H. Bla. 504.

(e) 1 East, 192.

(f) 1 Barn. & Cress. 181; 2

Dowl. & Ryl. 288.

(g) 7 East, 558.

of the bulk of which he exhibits the samples. The samples must have been taken by virtue of 32 Geo. 2, c. 29, s. 1, and would therefore be taken from the bulk in the presence of an officer of excise. In *Foster v. Frampton* (a), Lord *Tenterden* said "The warehouse of the carrier was, I think, the warehouse of the bankrupt, exclusive of the circumstance of the samples being taken, which is a fact relied on in one of the cases (b); I am therefore of opinion that the transitus was at an end." In *Cooper v. Elstone* the samples delivered formed no part of the wheat sold. Nor does it appear that in *Bloxam v. Morley* the samples were parcel of the bulk. The marking also extinguished the right, and from that time *Yates* became *Collard's* agent, and held on his account, per Lord *Ellenborough*, in *Stoveld v. Hughes* (c), *Ellis v. Hunt* (d). *Hodgson v. Loy* (e) may seem contrary, but in that case the goods were marked *before* they reached their terminus, which they never did reach; and therefore it does not impeach the conclusion that a marking by a vendee of goods in the actual possession of a warehouseman, as was the case here, has the effect of transferring the possession to the vendee. But, independently of these grounds, the plaintiffs are estopped from claiming the rums as against *Yates*, since by giving *Collard* an unqualified receipt, and by suffering him to cooper and mark and act as owner, they have put it in his power to commit a fraud on *Yates* and on the world. If *Yates* had so acted he would have been estopped, *Hawes v. Watson* (f); and the same rule should be acted on for, as well as against a warehouseman. It is not found that *Yates* allowed *Collard* to use his warehouse as his own. The plaintiffs are rather to be considered as the agents of *Collard*, than *Collard* as the agent of *Yates*. On three several occasions they purchased

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(a) 2 Carr. & Payne, 470; 6 B. & C. 107.

(b) Probably *Green v. Haythorne*, 1 Stark. N. P. C. 447, ante, 189, is the case here alluded to.

(c) 14 East, 308.

(d) 3 T. R. 464.

(e) 7 T. R. 440.

(f) 2 B. & C. 540; 4 D. & R. 22.



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of *Yates*, and resold at an advance (*a*), the same day, to *Collard*. They must have purchased in the character of *Collard*'s agents, otherwise why should *Yates*, who knew what *Collard* dealt in such articles, have been kept in the dark as to these transactions? *Collard* is to be considered as their unknown principal, and they are bound by his acts.

But the plaintiffs should have exercised their right of stoppage, if it existed, within a reasonable time; *Green v. Haythorne*. *Collard*'s credit was bad with them from the 5th October. If they had then given *Yates* notice, almost all the inconvenience which has followed would have been avoided. They did not even take the slightest notice when *Collard*'s first bill was dishonoured on the 29th October, but waited three weeks without asserting their right. *Yates* had no knowledge of the two delivery-orders given by the plaintiffs. The plaintiffs' object appears to have been to deliver to *Collard* the symbols of property, in order that he might go into the market, and by reselling the goods, be enabled to pay them the advanced price at which they had sold to him; if not, they hoped by keeping back delivery-orders to retain their hold of *Yates*, and, by this ingenious scheme, to secure their own interest in either event.

But supposing the plaintiffs to be entitled to recover any portion as against *Yates*, then as to so much *Yates* ought to be exonerated from his co-defendants. They must have known that *Collard* was not the importer, and ought to have made inquiries of *Yates*. If the marking and the other circumstances should be considered as not vesting the actual possession in the co-defendants, and thereby barring the right of stoppage in transitu, then it must follow that the defendants never obtained possession; and *Knowles v. Horsfall* shews that they never acquired the reputed ownership. *Yates* cannot be estopped as to them, for he was ignorant of their acts; nor can he be considered as to them the principal of *Collard*, for they dealt with *Collard* on his own account, and not as agent. The Ware-

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(a) 6 Geo. 4, c. 112, s. 9.

(b) 1 Atk. 245.

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the defendant instead thereof, on the ground that the costs of taxation, where they are taxed upon a rule of Court, cannot be made the subject of a set-off, inasmuch as the payment of them can only be enforced by the special authority of the Court.

*Plutt and W. H. Watson* now shewed cause. The defendant cannot be entitled to set off the whole amount of the bill delivered, for if he were so entitled, he might recover 400*l.* when the Master had found that no more than 300*l.* was due. Why should not the costs of taxation be added as a debt to the other side? If the sum to which the original bill is moderated is all that can be set off against the plaintiff's debt, then, inasmuch as it is incident to this mode of investigation, that the costs of taxation shall abide the event according as more or less than one-sixth is taken from the bill, those costs become a part of the account standing between the parties. This action is brought for the purpose of effecting a settlement of the account, which object will not be obtained if the costs of taxation are not to be noticed.

LITLEDÁLE, J.—A party cannot set off any sums but such as can be made the subject of an action.

PARKE, J.—These costs are only to be enforced by attachment. The plaintiff cannot bring an action in respect of them(*a*). Suppose that after taxation, when more than one-sixth had been taken off, the attorney had died, the executor would be entitled to recover the reduced sum, and not merely the reduced sum minus the costs of taxation.

Rule absolute. (*b*)

(*a*) *S. P. Fry v. Malcolm*, 4 Taunt. 705.

(*b*) The statute of 8 *Geo. 2*, c. 24, does not give a *replication* by way of set-off. If *A.* declares against *B.* upon a bond for 100*l.*, and *B.* pleads a set-off for goods sold and delivered to the extent of 200*l.*, *A.* cannot defeat that set off

by replying a debt from *B.* to *A.* upon a promissory note.

In this case it was probably considered at nisi prius that the effect of the order of the Master of the Rolls, coupled with the second taxation, was to *extinguish* so much of the defendant's bill of costs.

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CLUTTERBUCK, Assignee of GINGEL, v. COOMBS.

GINGEL v. NICHOLLS.

IN Easter term last *Godson* obtained a rule nisi to discharge an order made by *Gaselee, J.* to refer to the master the several bills of costs delivered by *Clutterbuck* to *Gingel* the bankrupt, for business done in the cause of *Gingel v. Nicholls*, and in all other causes and matters wherein he was concerned for the said bankrupt, and forming his debt as petitioning creditor, and that the defendant should pay the costs of such taxation and of that application to be taxed. The affidavits disclosed the following facts: *Clutterbuck's* bills of costs amounted to 104*l.* *Gingel* having refused to have the bills taxed, *Clutterbuck* caused them to be taxed, and they were reduced upon taxation to 98*l.* 18*s.* *Gingel* being in prison at the suit of *Clutterbuck* petitioned the Insolvent Debtors' Court for his discharge on the 7th June, 1832, and in the schedule to his petition inserted the name of *Clutterbuck* as a creditor to the amount of 104*l.*, admitted. *Clutterbuck's* bill having been reduced to 98*l.* 18*s.*, he joined with another creditor whose debt amounted to 65*l.* and struck a docket against *Gingel*. A fiat in bankruptcy was accordingly awarded against him, which has since been prosecuted. *Clutterbuck* was appointed sole assignee under the fiat, and in that character commenced the first of the above actions for a debt due to *Gingel*. In December last *Clutterbuck* was served with a copy of a petition, with a prayer on the behalf of *Gingel* to have the bills taxed. This petition was dismissed by the Court of Review upon the merits, for this among other reasons, that *Gingel* had in his schedule admitted upon oath the full amount of 104*l.* as due to *Clutterbuck*.

The Court will not grant a rule for the taxation of an attorney's bill of costs at the instance of a third party, who makes the application simply for the collateral purpose of reducing the bill so low as to make him a bad petitioning creditor.

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In the affidavits in opposition, it was stated that *Gingel* being in prison had discovered inaccuracies in the bill, and had in consequence directed the attorney who conducted for him the petition to the Insolvent Debtors' Court, to insert the debt of *Clutterbuck* as disputed, and also to enter a set-off against the same; and that he did not discover that the debt and set-off had not been so entered until after his discharge; that *Gingel* had obtained his discharge under the insolvent debtors' act, but previously thereto he had been served with a notice of a fiat in bankruptcy issued against him upon the petition of *Clutterbuck*; that upon his examination before the commissioners *Gingel* protested against any further proceedings being taken under the fiat, on the ground of the insufficiency of the petitioning creditor's debt; that upon a summons obtained by *Coombs* for taxing *Clutterbuck's* bill of costs, *Clutterbuck's* agent attended and opposed, though without effect, the granting of the order; that upon attendance before the master, *Clutterbuck* tendered a further bill of costs, which had not been delivered before the bankruptcy, and claimed to have it taxed; that the master considering that such further bill of costs was not within the order, *Clutterbuck* obtained a summons to appear before the judge who granted the order, to shew cause why the master should not be at liberty, on taxing the costs under the former order, to tax a further bill of costs of *Clutterbuck* in causes wherein he had been concerned for *Gingel* before his bankruptcy; that by consent such order was issued for the taxation of the further bill, without prejudice to any objection as to the competency of *Clutterbuck* to add the further sum to the amount sworn to at the time of issuing the fiat; that *Clutterbuck* never, at the appearance before the master, objected to proceeding under the order of Mr. Justice *Gaselee*, and that *Coombs* had no intimation of any objection being intended to be raised until he received a copy of the rule obtained to set aside the first order.


*R. V. Richards* now shewed cause. The Court may in all cases, without reference to the statute of 2 Geo. 2, c. 23, order the bill of an attorney to be taxed. [*Littledale, J.* That has been repeatedly denied.] There are several cases in which it has been so decided. Anonymous, 2 *Chitty's Reports*, page 165. [*Littledale, J.* There were cases some years ago, but of late the Courts have held otherwise.] There is a modern case of *Wilson v. Gutteridge (a)*, in which the Court said "we have a paramount jurisdiction, independently of the statute, to refer an attorney's bill for taxation." In *Dagley v. Kentish (b)*, the Court do not say that they have no jurisdiction, although in that particular case they thought it not proper to interfere. (*Godson* here stated to the Court that the application to set aside the order to tax the costs was founded partly upon the circumstance that such order had been obtained on the application of a third party, in order to reduce the petitioning creditor's debt. [*Parke, J.* Surely that cannot be allowed.] *Clutterbuck* ought not now to be allowed to dispute the jurisdiction of the master under the peculiar circumstances, for he has acknowledged it by various acts. He has attended on several occasions before him, tendered a further bill of costs, and obtained from the judge a summons calling upon *Coombs* to shew cause why such further bill should not be taxed by the master. An order to this effect was afterwards granted upon the consent of both parties. By all these acts *Clutterbuck* has acknowledged the jurisdiction of the master; and it was not until he found that the master's determination was likely to be unfavourable to him, that he betook himself to the present course of proceeding.

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The COURT, without calling on *Godson* to support his rule, said—It cannot be right for a third party to apply to tax the costs when the party himself has acquiesced; but, inas-

(a) 3 B. & C. 158; S. C. 4 D. & R. 736.

(b) 2 B. & Ad. 411.

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much as *Clutterbuck* has led *Coombs* to believe that he acquiesced in the reference to the master, he must pay the costs of going before the master.

Rule absolute.

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The KING v. The Inhabitants of DEVONSHIRE (a).

A county bridge having been washed away, was, after the passing of 43 Geo. 3, c. 59, rebuilt, wider than before, and, without notice to the county surveyor, by the parish, partly with the old materials, and in the same line of passage over the river: Held, that the county was liable to repair, and that this was not a new bridge within the meaning of that act.

**THIS** was an indictment against the inhabitants of the county of Devon, for the non-repair of a bridge, called Tipton bridge, in the parish of Ottery St. Mary, in the king's common highway, leading from Ottery St. Mary to Sidmouth, being a common highway for all the subjects of the king and his predecessors, on foot and with horses, carts and carriages, to go, return, pass and repass, ride and labour, at their free will and pleasure.—Plea: Not guilty. At the trial of this indictment, before *Park, J.*, at the Dorset spring assizes, 1833, it was admitted, that previously to the year 1803, Tipton bridge had been used by the public as a carriage bridge, which bridge the county was then liable to repair. The following facts were then given in evidence:—The bridge was a wooden bridge, resting on stone buttresses on each side of the river. In 1807 the wood part of this bridge, which had only a pair of legs, was lifted up by the water, in an extraordinarily high flood, and carried some distance down the river in two parts. The stone buttresses, however, remained uninjured—such parts of the old bridge as could be recovered were brought back, and applied by the parish as materials towards building a new and wider bridge, with two pairs of legs, upon the same buttresses and on the same site, which was completed at the expense of the parish, and not of the county. The bridge was widened to the extent of eighteen inches or two feet. Since that period the enlarged bridge has been used by

(a) This case was taken out of its turn on account of the public inconvenience.

the public as a carriage bridge, and has been repaired at the sole costs of the parish. The bridge of 1827 was not built under the superintendence of the county surveyor, or other person appointed for that purpose, according to the provisions of 43 *Geo. 3*, c. 59, s. 5. On the part of the prosecution it was contended, that under these circumstances the bridge, which it was admitted was then out of repair, ought to be repaired by the county; that the county was subject to general liability to repair all bridges used by the public and of public convenience, and that the act of 43 *Geo. 3* discharges the county only in cases where bridges entirely new are built by private individuals or bodies, without complying with the provisions of the act. Under the direction of the learned judge, the jury found a verdict of guilty, subject to the opinion of this Court upon the point raised, with power to order the entry of a verdict of acquittal. Last term, *Crowder* obtained a rule nisi for an acquittal; against which

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*Campbell*, S. G. and *Elliott*, now shewed cause. This bridge cannot, in any sense, be considered as a new bridge, erected or built since the passing of 43 *Geo. 3*, c. 59, s. 5; that statute only applies to cases where a new bridge is erected on a site where no bridge of the same character or description existed before. The object of the act was to prevent the increase in the number of bridges which the county would be liable to repair; this is clearly pointed out by Lord *Tenterden*, C. J. in his judgment in *Rex v. Inhabitants of Derby* (a), and is totally inapplicable to a case like the present. The mere fact of pulling down and rebuilding an old bridge does not destroy the identity of the bridge. This appears from the case of persons bound by prescription to repair an ancient bridge. A bridge of this sort may be washed away and rebuilt repeatedly, even without any of the old materials being used, still the liability of the persons

(a) 3 Barn. & Adol. 450.



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bound to repair continues; they cannot plead that it is a new bridge, erected within the memory of man. But even supposing, in this case, the bridge which is now in existence can in any sense be considered as a bridge erected since the passing of 43 *Geo. 3*, c. 59, and that the provisions of this statute have not been complied with, what is there in the act to prevent the public from calling upon the county to restore the bridge which existed in 1803? Nothing in the act discharges the county from any liability which then existed; it only provides for future cases. There is no statute of limitations applicable to a case like this, and the defendants may be convicted on this very indictment for not replacing the bridge of 1803. This is not a case within the mischief contemplated by the statute. The defendants have been benefited rather than prejudiced by having the bridge rebuilt for them at the expense of others, when they were bound to do it themselves, and no increased burden is sought to be thrown upon them; they are only called upon to do now, what they ought to have done then. But it is said they may have been prejudiced. If this be so, they had the power to prevent it; for if their surveyor had done his duty, he might have forbidden any persons from interfering with the bridge. The bridge was always under the protection of the county, and this is not like the case of a new bridge, the building of which the county could not prevent. *Rex v. Inhabitants of Surrey* (a) is relied on by the other side, but that case was decided by Lord *Ellenborough* expressly on the ground that an increased burden had been thrown upon the persons bound to repair the old bridge. This case cannot be distinguished from the case of *Rex v. Inhabitants of Lancashire* (b). It was there decided that the statute only applies to bridges newly built, not to a bridge merely widened or repaired since the passing of the act. In the present case the buttresses of the old bridge remained unmoved, all the

(a) 2 Campb. 654.

(b) 2 Barn. & Adol. 812.

old materials were used, and the bridge widened to the extent of eighteen inches or two feet, but this is the same bridge only changed in figure—from a biped to a quadruped.

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*Crowder* and *Praed* contra. This case is both within the words of the act, and within the mischief which it was the object of the legislature to prevent. The argument has not been put upon the circumstance of the same materials having been used, and would be equally good to shew that the county would be liable to repair a suspension bridge, if such a one had been substituted for the old bridge. The bridge that has been erected here is a new bridge, and not merely an old bridge repaired. The words in the act include the rebuilding of a bridge, although that express word is not used, for a rebuilding is in fact a building, and only called by that name because there happened to have been, at some previous time, another bridge in the same place. The statute of 22 H. 8, c. 5, relative to bridges and highways, speaks, in section 5, of "*the repairing, re-edifying, and amending*" of bridges.

If it were perfectly clear that the legislature contemplated the rebuilding of a bridge, the language found in 43 Geo. 3, c. 59, is that which would have been adopted. With respect to the intention of the legislature, it has been contended that additional bridges only were meant, but there is nothing in the act to support that argument. It is a remedial act intended for the relief of counties, and this case is within the mischief. The mischief is the charging the county with the repairs of new bridges erected by individuals, and also with the repairs of bridges which are altered and rendered more expensive, or are built less substantially. It may well be, that when a bridge is rebuilt by an individual, the expense of repairing is increased, for it may have been built in a fantastical manner, or the individual may have employed architects

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or surveyors not so well qualified as the surveyor employed by the county. [*Parke, J.* What is there to prevent the county from being liable now to repair the old bridge?] The impossibility of doing so, a new bridge being built in its place. [*Denman, C. J.* They would then be freed from their liability to repair, by reason of their having neglected to do their duty when the old bridge was washed away.] The county might have been indicted. It must be presumed that the parish had some object in taking upon themselves the burthen of rebuilding; probably they wished it to be wider, and knowing that the county was not liable to widen the bridge, they, on this account, neglected to comply with the requisition to call upon the county surveyor. The act is in favour of counties, and must be construed liberally. *Rex v. Inhabitants of Derby.* [*Littledale, J.* If we were in this case to give judgment for the defendants, they would then be liable to an indictment for not rebuilding the bridge which was formerly washed away. The county was, in point of law, liable, and the parish built it, probably under a mistaken notion as to their liability. Therefore the county might prosecute the bridge as a nuisance, abate it, and build another.] In *Rex v. Lancashire* a bridge had been widened only: even there Lord *Tenterden* seemed to perceive the great mischief that would arise from holding the county liable in such a case, and he said "but the case of a bridge widened, as in the present instance, appears not to have occurred to the legislature; at all events it is not within the words of the statute." Here the identity of the bridge is destroyed. It is not merely a bridge to which an addition has been made, but a substituted bridge; which differs the case from *Rex v. Lancashire*. *Rex v. Surrey* is directly in point. Though it is stated, that the old bridge in that case was used as a carriage and cart bridge only in times of flood, it does not appear that a party might not at any time have insisted on his right of passing the bridge with a carriage, if it had suited his convenience

so to do. If a party were to remove a bridge, not requiring repair, and had built in its place one less substantial but more beautiful, would the county be liable to repair? It is apprehended that they would not. For the purpose of charging the county, their surveyor ought to have notice, in order that he may superintend the building. [*Denman, C. J.* He would have superintended without notice, if he had done his duty.] There is this insuperable difficulty in now charging the county, that the inhabitants are only chargeable with rates in respect of a liability which arises during the year for which the rate is made.

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**DENMAN, C. J.**—It appears to me that this is clearly the same bridge. The old abutments remain, several parts of the old bridge, and some of the planks, were used in building the present bridge. Therefore, I think, it is a bridge which the county is liable to repair. It is said that this is a new bridge, and that, as no notice was given to the surveyor, the county is not liable to repair; but the surveyor ought to have known in what state of repair the bridge was. I think this a bridge “repaired and re-edified.” It is not material to inquire minutely how much of the old bridge remained: indeed, I think, I should not have entertained a different opinion if the bridge had been entirely new. I do not think that in order to constitute a bridge, in contemplation of law, the same bridge, identity of matter is necessary, but merely that there should be a bridge crossing the river at a particular spot in the same line of passage.

**LITLEDALE, J.**—We are not informed what induced the parish to rebuild, but that is not material for us to inquire into. In 1807 there was a bridge, which the county was liable to repair. The present bridge stands upon the same abutments, and may be fairly taken to be the very same bridge that was washed away. If it is the

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same bridge, all difficulty upon the case vanishes. If, however, not a vestige of the old bridge had remained, I should have had considerable doubt as to whether it fell within the description of bridges built after the passing of the 43 *Geo.* 3, c. 59, which the county is liable to repair. The object of the 5th section of the act, I think, was to protect counties from liability to repair bridges erected and built by individuals, since the passing of the act, whether those bridges were built upon entirely new sites, or in the place of others which had been *totally* destroyed.

PARKE, J.—Although of the same opinion as to the object of the section, I think that is not a bridge within the meaning of the 43 *Geo.* c. 59, erected and built since the act passed. It is really and in substance the same bridge, upon the facts of this case. In restoring it much of the old wood was employed. In substance, this was only a repairing the old bridge. Suppose this bridge had been built 100 yards off, and with entirely new materials, what is there to prevent the county from being liable at the present time to replace the old bridge, which was washed away in 1807?

PATTESON, J.—I never had any doubt upon the subject. I think that this is the same bridge and not a new one; and that is sufficient.

Rule discharged.



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DOE *dem.* PAUL SLADE KNIGHT *v.* Sir MOLYNEUX  
HYDE NEPEAN, Bart. and others.

**EJECTMENT** for two copyhold tenements in the parish of Loders, in the county of Dorset, and within the manor of Loders and Bothenhampton. The declaration was of Trinity term, 1 *Will.* 4, and contained several demises, the earliest being in 1815. At the trial before *Taunton, J.*, at the Dorset summer assizes, 1832, the following facts appeared:

*George Knight*, the father of the lessor of the plaintiff, was tenant by copy of court roll, for the life of his brother *Matthew*, remainder to the lessor of the plaintiff, as appeared from a surrender and admittance of 1797. *Matthew Knight* left England about 1797, and was not seen or heard of until the latter end of the year 1806, when he was seen by his family for a short period. In the month of May or June 1807, a letter was received from him, dated at Charlestown, but since that period no tidings of him have ever been received. The defendants relied upon a supposed adverse possession by Sir *M. H. Nepean*, and those under whom he claims, for a period of more than twenty years; the lessor of the plaintiff, on the other hand, contending that *Matthew Knight* having been last heard of in the year 1807, the presumption of his death did not arise until the expiration of seven years from that time, and that therefore his right of entry did not accrue to him until 1814. The learned judge said, if a party is not heard of for seven years, at the expiration of that time the presumption of his death arises. Therefore, in this case, the adverse possession began in 1814, and the action is brought in 1831. The learned judge directed the jury to find for the lessor of the plaintiff, but reserved the point, giving the defendants leave to move to enter a nonsuit. In Michaelmas term last *Follett* accordingly obtained a rule nisi for a nonsuit: against which,

Though, where a party has not been heard of for seven years after going abroad, he will, at the expiration of that time, be presumed to be dead, there is no presumption raised by the law as to the time when the death actually took place; but this is a matter concerning which the jury must form their own opinion upon the particular facts of the case.

Ejectment brought by a remainderman more than 20 but less than 27 years, since the tenant for life was last heard of, cannot be supported without other evidence from which the jury may infer that tenant for life was alive within 20 years.

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In Easter term last, *Coleridge*, Serjt. and *Erle*, shewed cause. The lessor of the plaintiff has shewn that *Matthew Knight* was alive within a period of time from which, under the circumstances, the law will presume that he continued alive seven years. In certain cases, from certain facts given, the law draws certain conclusions, which are called legal presumptions. Some there are which nothing is allowed to contradict, and in all the presumption is sufficient to set up a case for the party in whose favour it is raised, and to throw upon his adversary the burthen of proving the contrary. Such is the presumption which the law raises as to continuance of life. In the older cases it will be found that the law presumed this continuance of life to an absurd extent, and the presumptions of life continued very indefinite until the passing of the statute of bigamy and the statute respecting leases dependent on lives, when the presumption was limited to seven years. Subject to this limitation, the old law still continues. As against the lessor of the plaintiff, if it had been proved that *Matthew Knight* had gone abroad, or been heard of within seven years from the time of commencing the action, the evidence would have been conclusive, because the defendant might have said, that by presumption of law, the party from whom you claim is alive, and therefore you can have no right of entry upon which to ground your ejectment. Why then, if the action be brought after the expiration of seven years, shall not the same rule of evidence be adopted, and the plaintiff be entitled to say, that by presumption of law, *Matthew Knight* was alive until the expiration of seven years? At the end of eight years, it should be presumed that the party has been dead one year. Shall it be said that during the whole of the seven years the party shall be presumed to be alive, and that immediately upon the expiration of that period, he shall be presumed to have been dead from the very beginning? It is true that upon a question of bigamy, the law will, after the expiration of the seven years, pre-

sume that the husband was dead at the time of the second marriage, occurring within that period; but that is owing to another and a stronger presumption of law, namely, that in favour of innocence. It is apprehended, that for the purposes of this ejectment, proof that a party was alive within such a distance of time, that the seven years would not expire until within twenty years, and that he had not since been heard of, would be equally availing as positive proof that he was alive within the twenty years. The presumption operates as proof that the party was alive until the expiration of the seven years. In the case of *Doe d. George v. Jesson* (a), Lord Ellenborough said, "The presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living;" which seems to be in other words saying, that the presumption of life continues for seven years. "Therefore, in the absence of all other evidence to shew that he was living at a later period, there was fair ground for the jury to presume that he was dead at the end of seven years from the time when he went to sea on his second voyage, which seems to be the last account of him." This, it is true, is only to be regarded as the dictum of that learned judge, as it did not relate to the main question in the case. Here, the jury has presumed that *M. Knight* lived till the end of seven years from the time when he was last heard of; and thus the presumption of life being brought down to within twenty years of the time of bringing the ejectment, the other presumption, that of death, arising after that period, is proof that the right of entry did accrue within 20 years. The conclusion of fact to be drawn from the circumstances is not now indefinite as formerly, for the law has settled what it is to be; and the Court will not, after the expiration of the seven years, allow evidence of probabilities to be introduced into each case. In *Doe d. Lloyd v. Deakin* (b), in order to prove the death of a person who had been tenant for life, evidence

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(a) 6 East, 85.

(b) 4 B. &amp; Ald. 433.



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was given of absence for fourteen years. The learned judge told the jury that this was *primâ facie* evidence of death, upon which they found a verdict for the plaintiff. An application was made for a new trial, and it was contended that proof of absence for fourteen years, was not even *primâ facie* evidence of death, and that though it might furnish a presumption of death, when coupled with evidence of the party's not having been heard of during the whole period, yet that must be with reference to the particular circumstances of the case. But the Court decided that such evidence unanswered was sufficient to raise a presumption of death, and they quoted in their judgment the dictum of Lord *Ellenborough*, in *Doe v. Jesson*. The true test, whether the right of entry accrued within twenty years, is by inquiring whether twenty years ago the lessor of the plaintiff could have brought this ejectment. It is clear that he could not, for then it could have been answered that his right of entry had not accrued (*a*). Suppose a term of years to commence upon the death of *Matthew Knight*, and he had gone abroad and not been heard of for seven years, when would the term commence? Surely from the period up to which the law presumes that he is alive, and at which that presumption ceases. If it is not to be presumed that the death took place at the time when a party is no longer presumed to be alive, it seems that the presumption must be that the party died on the day in which he was last heard of. This would be unreasonable and inconsistent with all probability.

*Follett*, *contra*. There is no presumption whatever of the time of death recognized by the law of England. The presumption of the fact of death has been confounded with the presumption as to the time of death. According to the old law, the presumption would have continued down to the present day, but now it is otherwise, and there is no doubt that in this case the lessor of the plaintiff has proved the death of *Matthew Knight*, and thus has shewn that his

(*a*) Stark. Ev. 457; 1 Roll. Rep. 416.

right of entry has accrued. But then comes the question whether the right of entry accrued within twenty years. The rule contended for, that death shall be presumed to have taken place at the expiration of the seven years, would be contrary to the principles of many decisions. If *A.* gives a legacy to *C.* if *C.* shall survive *B.*, and *B.* goes abroad and is not heard of for seven years, will *C.* be necessarily presumed not to have survived *B.* unless he lives more than seven years after *B.* was last heard of; or from what time shall he be entitled to his legacy? From the time of the departure, from the time when, from the circumstances, it appears probable that the death actually took place, or from the expiration of the seven years only? In *Norris v. Norris* (a), where a legacy of 100*l.* was left to one *Richard Norris*, who went to sea and was not heard of for five years, his brother having taken out administration, exhibited a bill against the executors for the 100*l.* The Court decreed the 100*l.* and interest to be paid to the plaintiff from the time of *Richard's* departure, giving security for three years to repay it to *Richard* if he should return. The presumption rather is, that the party did not live until the end of seven years, since it is rather to be supposed that if he had continued alive, he would have been heard of. Suppose the case of a legacy to *A.*, if he shall survive *B.*, and *B.* goes abroad and *A.* dies six and a half years after *B.* was last heard of, would the Court presume that *B.* outlived *A.* by six months, and thus send the property in a different direction? The question is not whether death is to be presumed, but whether it shall be presumed that the party did not die until the end of seven years. The presumption as to the fact of death may be set right by the parties appearing at any future time to claim the estate; but there may be no means of correcting a presumption as to the time of death. In *Rowe v. Hasland* (b), a leading case upon this subject, Lord Mansfield says "in establishing

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Legacy on  
contingency of  
survivorship.

(a) Finch, Rep. 419.

(b) 1 W. Bla. 404.

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v.  
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a title upon a pedigree, where it may be necessary to throw a branch of the family out of the case, it is sufficient to shew that the person has not been heard of for many years, to put the opposite party upon proof that he still exists. What is done on such a trial is no injury to the man or to his issue, if he should afterwards appear to claim the estate." (a) In none of the cases has the presumption been allowed as to the *time* of death either in Courts of Equity, or in Courts Ecclesiastical, or in Courts of Common Law, but the *time* of the death in each case is presumed only from the particular *facts*. It is entirely a question of fact. In cases where persons have perished together in ships, no presumption of law arises as to the time at which the several individuals died; and in this respect the law of England differs from the law of France (b). *Taylor v. Diplock* (c), *Broughton v. Randal* (d), *Mason v. Mason* (e), *In the goods of Henry Selwyn* (f). There was a case upon this point with respect to parties who were murdered at Portsmouth. A housekeeper and her mistress were murdered together, and the mistress having left her property to the servant, it became important to the representatives of the servant to establish a survivorship by her.

These cases have been referred to for the purpose of shewing that there has never been any presumption as to the time of death. The onus of proof lies upon the claimant. In *Watson v. King* (g), one *Maxwell* sailed in a ship

(a) And see F. N. B. 196, A. L.

(b) "If persons perishing together were less than fifteen years of age, the eldest shall be presumed to have survived. If they were all above sixty years old, the youngest shall be presumed to have survived. If some were less than fifteen years of age and the others more than sixty, the former shall be presumed to have survived.

"If persons perishing together were more than fifteen and less than sixty years of age, the male

is always presumed to have survived, when their age is equal or the difference does not exceed one year. If they were of the same sex, that presumption of survivorship which will occasion the property to descend in the order of nature shall prevail." *Code Civil* (formerly *Code Napoléon*), No. 721, 2.

(c) 2 Phillimore, 461.

(d) 2 Bac. Abr. 366.

(e) 1 Merivale, 308.

(f) 3 Hagg. Eccl. Rep. 748.

(g) 1 Stark. N. P. C. 121.

which parted from her convoy in a gale, and after a lapse of a year and a half, had not been heard of, and it became important to ascertain whether he was alive on the 8th of June. Lord *Ellenborough* told the jury, "that it might be assumed that *Maxwell* was dead; but that it was for their consideration whether he was dead on a particular day." At the end of a certain time it will be presumed that a ship is lost or a party dead, because it is to be presumed that the ship or party would have been sooner heard of if not lost or dead, but it does not follow that the ship was lost or that the party died on the very day on which the presumption of loss or death is allowed to be raised. Here then it has not been shewn that the right of entry accrued within twenty years.

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*Cur. adv. vult.*

In this term the judgment of the Court was delivered by DENMAN, C. J. (who stated briefly the facts of the case, and then proceeded.)—We are of opinion that the rule should be made absolute. There is no doubt but that the lessor of the plaintiff must recover by the strength of his own title, and in order to do so, must prove that he had a right to enter upon the land sought to be recovered, and that his right accrued within 20 years before the ejectment brought; and consequently, as the presumption is that a person once alive continues so, until the contrary be shewn, the lessor of the plaintiff was bound to prove, first, the death of *Matthew Knight*, and secondly, that it took place within 20 years before the ejectment was brought. The absence of *Matthew Knight* abroad for seven years, without having been heard of, is evidence from which the jury might presume, and, in this case, probably did presume his death. That period has been adopted upon analogy to the statute of 1 *Jac.* 1, c. 11, relating to marriages, and that of 19 *Car.* 2, c. 6, as to copyholds and leases for lives. Therefore the plaintiff has certainly established the first of the two points necessary to maintain his case. But such

Plaintiff in  
 ejectment to  
 recover by the  
 strength of his  
 lessor's title.

First point:  
 Proof, that  
 a right of entry  
 has accrued.

Second point:  
 Proof, that it  
 has not accrued  
 more than  
 20 years.

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going abroad and absence for seven years has no tendency to prove the precise time when the party died, much less that the death took place exactly at the expiration of the seven years; and no case has been cited, nor are we aware of any, in which it has been laid down that a presumption as to the exact time of the death ought to be drawn from the fact of absence. In *Watson v. King* it was laid down by Lord *Ellenborough*, that though where a ship has sailed, and has not been heard of for a considerable time, the jury may assume that she is lost, and that a person who was on board of her is dead, yet that it was a matter for *their* consideration whether such person was dead on a particular day. We are, therefore, of opinion that the lessor of the plaintiff, who gave no other evidence of *Matthew Knight's* death than that of his absence, failed in establishing the second point, viz. that his death took place within 20 years before the time when the ejectment was brought. The difficulty of proving the precise time of the death in this and similar cases, appears at first sight to lead to hardship on the lessor of the plaintiff, who cannot bring his ejectment until seven years have expired, for till then the death is not to be presumed, and yet must bring his action within 20 years from the period when his right accrued, which period he is not able to ascertain. But the party would always be secure if the action was commenced within 20 years of the time of the departure of the person upon whose death his right would accrue (a). The case where a party is ignorant of his rights until he is barred by the statute of limitations, may also be said to be a hardship. On the other hand, if we were to lay down a rule that death shall be presumed not to have taken place till the end of

(a) The twenty years allowed by 21 *Jac.* 1, for asserting a right of entry, would thus be reduced to thirteen. This appears to be the only hardship on claimants, except in cases where, during the seven years when the claimant had no proof of title, a *disability* had supervened, which assuming that the twenty years had begun to run, would be no protection. And see note (A) at the end of this volume.

the seven years, we should not only be directing the jury, a conclusion which would be in almost all, probably in every case, contrary to the fact, but we should be causing greater hardships to the parties who may have been in possession for more than 20 years since the actual death.

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Rule absolute.

COTTLE v. WARRINGTON, Clerk.

THE defendant, being vicar of St. Lawrence, Jewry, in the city of London, by indenture bearing date 9th August, 1811, granted an annuity of 150*l.*, charged (a) upon that living. By this indenture the defendant covenanted with the plaintiff, that if he should exchange that living for any other living, he would, within eight months, charge such living so to be gotten in exchange, with the payment of the annuity. At the same time the defendant executed a warrant of attorney, authorizing certain persons to confess judgment in an action for 1800*l.* at the suit of the plaintiff. By a defeazance on the warrant of attorney it was declared, that the judgment was to be entered up for securing the payment of the annuity; and it was thereby agreed, "that no execution should be issued upon that judgment, unless and until some quarterly payment or proportion of the annuity should be in arrear for thirty days, and then and in every such case it should be lawful for, and the defendant did thereby authorize and empower the plaintiff to recover, and it was thereby agreed that the plaintiff, his executors &c. should and might from time to time sue out such execution or executions, upon or by virtue of the said judgment, as he should think fit or be advised, for the recovery of the arrears of the annuity and all costs." The defeazance then provided, that execution might issue without reviving the judgment by scire facias.

Glebe land is bound by the delivery of the writ of fieri facias de bonis ecclesiasticis to the bishop, but is not affected by the judgment. Therefore a judgment confessed by an incumbent in the North Riding of Yorkshire, is not an incumbrance upon the living, so as to require registration, under the North Riding Register Act.

(a) Vide *Shaw v. Pritchard*, 5 Mann. & Ryl. 180; 10 B. & C. 241.

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It then provided, that from and after the decease of the defendant and full payment of all arrears of the annuity, and all costs &c. the plaintiff should, at the request and at the costs and charges of the heirs &c. of the defendant, acknowledge satisfaction upon the roll.

1811. The plaintiff assigned the annuity to *Metcalfe*.

February, 1814. The annuity being in arrear, *Metcalfe* entered up judgment on the warrant of attorney and issued execution, and sequestered the living.

November, 1814. The defendant exchanged St. Lawrence, Jewry, for the vicarage of Leake, in the North Riding of Yorkshire, which he still holds.

May, 1815. Execution was taken out on the judgment on the warrant of attorney, and a fieri facias de bonis ecclesiasticis issued to the Archbishop of York; and subsequently for each half year's annuity and the costs, similar writs have from time to time been issued, and by successive sequestrations the vicarage of Leake has been sequestered down to the present time.

November, 1818. The defendant, in pursuance of his covenant, executed a deed, charging the vicarage of Leake with this annuity.

Trinity Term, 1832. A judgment was obtained at the suit of *Meggison and others*, against the defendant.

10th August, 1832. A writ of fi. fa. de bonis ecclesiasticis of the defendant, on the judgment obtained by *Meggison and others*, was delivered to the Archbishop of York, previously to the issuing of which, this second judgment was registered at Northallerton.

A rule was obtained by *W. H. Watson*, on behalf of the second execution creditors, calling upon *Metcalfe* to shew cause why the Archbishop of York should not give priority to the execution at the suit of *Meggison and others*, and suspend the execution of the plaintiff's writ, or why it should not be referred to the master to ascertain the amount levied on the judgment at the suit of the plaintiff, and why the plaintiff should not pay the surplus above

1800*l.* to *Meggison and others*; and also why satisfaction of that judgment should not be entered on the roll,—upon two grounds, viz. that by 8 *Geo.* 2, c. 6, s. 1, (the North Riding register act (*a*),) the first judgment not being registered was void as against the second judgment and execution thereon; and, 2dly, that the first judgment was satisfied, more than 1800*l.*, the penal sum in the judgment, having been levied under the sequestration on that judgment.

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F. Kelly shewed cause. He admitted that he could not resist a reference to the master, to take an account of the moneys levied on the first judgment. On the first point, he submitted, that the judgment created no *lien* upon the glebe, which could not therefore be said, in the terms of the act, to be any way *affected* either at law or in equity.

Reference to master to take account of moneys levied under sequestration.

W. H. Watson, contrà. This case is within the words and within the meaning of the first section of the Register Act. [*Littledale*, J. How does a judgment affect glebe land of a vicarage? *Parke*, J. How does this differ from a common *fieri facias*?] The effect of a *fieri facias de bonis ecclesiasticis* is, to enable a person to obtain a writ of *sequestration*, whereby the profits of the land may be taken; *Tidd's* Prac. (*b*); *Arbuckle v. Cowtan* (*c*); in the same manner as

(*a*) Which enacts, "that a memorial of all deeds and conveyances which shall be made and executed, and of all wills and devises in writing, and of all judgments, statutes, and recognizances, (other than such as shall be entered in the name and upon the proper account of his majesty, his heirs and successors,) of or concerning, or whereby any honors, manors, lands, tenements, or hereditaments, in the said North Riding, may be any way *affected* in law or equity, may be registered in such manner as is hereinafter

directed, and that every such deed or conveyance, judgment, &c. shall be adjudged fraudulent and void, against any subsequent purchaser or mortgagee, plaintiff or cognisee, for or upon valuable consideration, unless such memorial thereof be registered as by this act is directed, before the registering of the memorial of the deed or conveyance, judgment, &c. under which such subsequent purchaser or mortgagee, plaintiff or cognisee, shall claim."

North Riding Registry Act.

(*b*) 9th ed. 1023.

(*c*) 3 Bos. & Pull. 421.

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on a *levari facias*, which is the ancient writ by which any lands were affected. [*Parke, J.* Are the lands bound by priority in the judgment or on the delivery of the writ to the archbishop?] Undoubtedly by the delivery of the writ to the archbishop. Lands are only affected by the *elegit*, although they afterwards are bound by relation to the date of the judgment. Lands of a bankrupt, on a commission before *elegit* and after the judgment, pass to the assignees. The statute 8 *George 2* looks to something beyond being *bound*: the words are "whereby any lands were *affected* by the judgment on the delivery of the writ to the bishop, and from that time required registration;" and consequently the first judgment and execution thereon were "fraudulent and void" as against the second execution.

Ecclesiastical
 livings bound
 by *fi. fa. de*
bonis ecclesi-
asticis, not by
 judgment.

The COURT was of opinion that the lands in this case were affected by the writ of execution, and not by the judgment, and consequently the statute 8 *Geo. 2* did not require that the judgment should for this purpose be registered. It was therefore referred to the master to ascertain the amount levied on the first judgment. And it was ordered that in the meantime the rule *nisi* should be enlarged until the master had made his report.

Reference to
 the master.

Master's
 report.

June 14.—The master now reported that 239*Sl.* 6*s.* 10*d.* had been levied under the sequestration issued by the plaintiff, and that *Metcalf* had received 59*Sl.* 6*s.* 10*d.* over and above the 1800*l.*, for which judgment had been entered up.

F. Kelly. The defeazance to the warrant of attorney shews that the judgment is to remain as a security for the payment of the annuity. There is no restriction against the levy beyond the amount of the judgment: on the contrary, the instrument is framed to allow the plaintiff to levy *all* arrears of annuity, even though they should by far exceed that amount. If this were an ordinary judgment, undoubtedly satisfaction ought to be entered as soon as the amount

of the judgment is paid; but as this judgment is meant only as a security for the payment of the annuity from time to time, and as this is an application to the equitable jurisdiction of the Court, the Court will not interfere in favour of the defendant unless equity be done by him to the plaintiff. [*Parke, J.* Under the 8 & 9 Will. 3, c. 11, which enables a party to suggest breaches from time to time, could you levy more than the amount of the judgment? If not, you cannot do so here.] At all events, the second execution creditors cannot be entitled to the surplus. [*Littledale, J.* After the amount of the judgment had been levied, the parties were trespassers in levying under the subsequent writs.]

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Trespass, in
levying after
judgment
satisfied.

W. H. Watson, in support of the rule. This application was made upon a consent, by the defendant, that the surplus should be paid to *Meggison and others*, the second execution creditors.

The COURT said that it was quite clear that the plaintiff could not in the whole levy beyond the amount of the penalty of the judgment. But a question of equity might arise, how the surplus should be disposed of; and therefore in that respect they would not make the rule absolute.

Rule absolute, without costs,—that satisfaction be entered on the roll from the 10th August, 1832; that the archbishop give priority to the writ at the suit of *Meggison and others* from that day; and that all sums levied after that day be paid to them (a).

(a) A bond, being a security only to the amount of the penalty, the obligee is in no case entitled to receive more than that amount and his costs of suit; *Brangwin v. Perrott*, 2 W. Bl. 1190; *White v. Sealy*, 1 Dougl. 49; *Wilde v. Clarkson*, 6 T. R. 303; *Shutt v. Procter*, 2 Marsh. 226; 1 Wms.

Saund. 58 a. So in equity, interest is not recoverable beyond the penalty; *Sharpe v. Earl of Scarborough*, 3 Ves. 557; *Mackworth v. Thomas*, 5 Ves. 329; *Clarke v. Seton*, 6 Ves. 411; *Van Wyck v. Montrose*, 12 Johns. (American) Rep. 350; *Bergent v. Boerum*, 2 Caines, (Am.) Rep. 256.

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LEEMING v. FEARNLEY and another.

An arbitrator to whom a cause in dispute as to the amount of rent due, and an action of replevin, the merits of which are involved in that dispute, are referred, has no authority to award a *stet processus*.

IN Hilary term last *Starkie* had obtained a rule nisi to set aside an award made in this case by an umpire appointed according to the terms of the submission. The affidavits disclosed the following facts:

This was an action of replevin. The plaintiff held of the defendant a dwelling-house in Bradford, at the rent of 14*l.* and a machine shop in the same town at 6*l.* 6*s.* a year. On 26th November, 1831, defendant distrained upon the plaintiff's goods in the dwelling-house for the sum of 11*l.* 13*s.* The goods distrained upon were alleged to have been of the value of 200*l.* On 23d November plaintiff had tendered to *Fearnley* 6*l.* the whole amount then due in respect of the dwelling-house. The remainder of the sum of 11*l.* 13*s.* was made up of an alleged arrear of 1*l.* 10*s.* and of 3*l.* 3*s.* rent due for the machine-shop. The plaintiff replevied, and the defendants avowed for 9*l.* 10*s.* under a demise at the rent of 15*l.* upon which issue was joined. By an agreement of reference, after reciting that differences had arisen between the plaintiff and the defendant, touching the amount of the rent agreed to be given in respect of the dwelling-house, and that this action was depending in respect of the distress made on the 26th November, 1831, for rent alleged to be due on the 23d November, it was agreed that the action and all disputes and differences whatsoever between the parties, touching the said distress, and also touching the rent that may have become due since the levying the said distress, and also the costs of the reference, should be referred to *Wade* and *Milnes* of Bradford, and in case they should not agree, then to the umpirage of such person as they should name as umpire. And it was also agreed that the costs of the said suit should abide the event of the said award. The arbitrators not being able to agree, appointed *Richardby* to be the umpire, who, after having heard the parties and received their evidence, awarded that

the action should cease and be no further prosecuted; and found that the amount of rent agreed upon was 14*l.* for the dwelling-house, and that at the time of taking the distress there was due in respect thereof the sum of 6*l.*, and that 7*l.* had since become due for rent of the dwelling-house. And he awarded that the said sums, together 13*l.*, should be forthwith paid by *Leeming* to *Fearnley*, and that the costs of the reference, amounting to 6*l.* 16*s.*, should be paid by *Fearnley*; and that the parties should, upon such payments being made, mutually execute a general release of all matters in difference between them up to the day of the date of the agreement to refer. It was contended on the part of the plaintiff, before the arbitrators entered upon the reference, that they had power to inquire into and decide upon the question of excessive distress, and that the attorney for the defendant *Fearnley* denied that they had such power, and stated that *Leeming* might bring his action for an excessive distress, if there had been such an illegal distress. The arbitrators and umpire were advised that they could not exercise any control over the costs of the suit.

The grounds of objection to the award, set out in the rule, were: First, that the umpire ought to have awarded, as to the replevin suit, in favour of the plaintiff: Secondly, that he ought to have awarded damages for an excessive distress: Thirdly, that he had made his award under a misapprehension of the law, particularly under the erroneous supposition that under the terms of the submission he could not in point of law award damages for an excessive distress: Fourthly, that he had awarded general releases: Fifthly, that he had not made any award for either party in the replevin suit, according to the submission.

F. Pollock and *Milner* now shewed cause. The umpire thought that nothing ought to be recovered beyond the sums of 6*l.* and 7*l.*, and therefore he has awarded a stet processus. Inasmuch as the umpire has found that the sum of 6*l.* only was due from the plaintiff to the defendant at

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the time of the distress taken, the award is on the face of it for the plaintiff, and therefore the defendant is liable to the costs of the suit, which are by the agreement to follow the event of the award. [*Parke, J.* That means the event of the suit referred.] The finding that money was due declares what is the event of the suit. [*Littledale, J.* Certainly not. It does not follow that because some money was due, therefore the distress was not excessive.] These arbitrators not being men learned in the law, the Court will not minutely criticize the language of the award, but will; if it be in their power, support an award, which is not essentially defective. The arbitrators thought that the action ought to be put an end to, and found that the sum of 6*l.* was due, which they directed to be paid. The Court will presume that the sum found to be due is the right amount, and that all is rightly decided, unless an illegality appear upon the face of the award; *Cramp v. Symonds (a)*. In *Jackson v. Yabsley (b)*, the arbitrators to whom an action of covenant and all matters in difference had been referred, awarded the plaintiff had no claim or demand on account of any of the alleged breaches of covenant or on any account whatsoever, yet the Court decided that the award was final, and said that it is sufficient if, looking at the whole award, it appear that the matter is determined. In this case, upon looking at the whole award, it does appear that the umpire has determined the matters referred to him.

Starkie contra was stopped by the Court.

Per Curiam.—The umpire had no power to order a *stet processus*, but ought, under the submission, to have ordered that the verdict in the replevin suit should be entered either for the plaintiff or for the defendant.

Rule absolute.

(a) 1 Bingham, 104; 7 B. Moore, 13 East, 357; *Price v. Hollis*, 1434. Maule & Selw. 105.

And see *Chace v. Westmore*, (b) 5 Barn. & Ald. 848.

SAMUEL COOMBS, the elder, and others, Assignees of
SAMUEL COOMBS, the younger, a Bankrupt, v. BEAUMONT.

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TROVER for steam engines, other engines, trams, tram waggons, carts, weighing machines, &c. laying the possession, in the first count, in the bankrupt, in the second, in the plaintiffs. Conversion, in both counts, after the bankruptcy.

At the trial before *Gurney, B.*, at the Monmouthshire summer assizes, 1832, the following facts appeared:

The bankrupt, at the time of his bankruptcy, occupied, under *Mary Jones*, executrix of *John Jones*, a mine called Gellydeeg, lying under a farm of about 200 acres, which he, together with his then partners, had, by lease of 31st May, 1825, taken from *Philip Jones*, who held the premises for a term. The lease contained a proviso, that an inventory should forthwith be made of all the workmen's tools, movable engines and machines, and materials, being the property of *Philip Jones*: And it was agreed, that the bankrupt and his partners, their executors &c., should have the full use and enjoyment of the said stock and movable engines and materials, during the continuance of the demise; and that the said stock, workmen's tools, and movable engines and materials should, at the expiration or sooner determination of the said term, together with all improvements, additions, and reparations which should be made of, in, or to the same by the bankrupt and his partners, at any time during the term, should be delivered up to *Philip Jones*, his executors &c., for his and their own use and benefit. The lease also contained a proviso for re-entry in case the *galenges* or sums thereby reserved should be in arrear, and no sufficient distress should be found, or in case the lessees should become bankrupt, or any judgment should be entered up against them, and execution should issue thereon.

Philip Jones assigned to *John Jones*, to whom *Mary Jones* is executrix.

The furniture of a coal mine is property of which the party who works the mine is the reputed owner, and which, upon his bankruptcy, will vest in the assignees, under 6 Geo. 4, c. 16, s. 72.

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1828. It being found in the course of working this mine, that it would be convenient to the lessees to obtain a lease of part of an adjoining estate, called The Bryn, the property of another *John Jones*, the son of *Mary Jones*, a verbal agreement for a lease of the coal under The Bryn was entered into. By this agreement, under which the lessees were permitted to take possession, it was stipulated, that in all respects the lease should conform with that previously granted; and also that *John Jones*, the son, should contribute to the expense of erecting an engine and of sinking a new pit.

August, 1829. One of the lessees having failed before the lease could be prepared, the defendant, as the agent of *John Jones*, the son, entered into an agreement with the other lessees, a memorandum of which was signed by the bankrupt, for himself and partners, whereby the lessees admitted and agreed that the steam engine, machinery, pumps, pipes, &c. and other materials in and about the pit then sinking upon part of the farm called The Bryn, with all additions which might thereafter be made to the same, should be held as the property of *John Jones*, the son, subject to the use of them, on their part, for raising coal upon all the terms, conditions, and covenants contained in the lease of The Gellydeeg Colliery, which was held under his mother, *Mary Jones*.

1829. The bankrupt only remaining, quitted, and from this time until his bankruptcy, he occupied alone. Many of the machines, &c. belonging to The Gellydeeg Mine, were used in the new pit, and other new ones, besides the steam engine, were purchased for The Bryn by the bankrupt.

7th February, 1831. *Samuel Coombs* committed an act of bankruptcy.

10th February, 1831. The defendant, as agent to *Mary Jones* and *John Jones*, the son, took possession of the mines and all the machines, &c.

12th February, 1831. The commission issued.

14th February, 1831. *Coombs* was declared a bankrupt.

This action was brought by the assignees to recover from *Beaumont* the value of the furniture of the two mines. At the trial it was contended, by *Campbell*, for the plaintiffs, that though as between *Mary Jones* and *John Jones*, the son, and the bankrupt, the property in question might belong to the former by virtue of the several agreements, yet inasmuch as they had permitted him to deal with it in such a manner as to acquire a reputed ownership, upon his bankruptcy the assignees became, under the 72d section of the Bankrupt Act, entitled to it for the benefit of his creditors. It appeared upon the evidence, that it was commonly known that old mines are ordinarily let ready furnished, but that virgin collieries are always let without furniture. *Ludlow*, Serjt. for the defendant, contended, that engines in no case passed to the assignees of a bankrupt, and that as to machinery and other things in collieries, the right to the ownership depended upon the terms of the agreement entered into between the landlord and the tenant; and he cited *Horn v. Baker* (a) and *Storer v. Hunter* (b). The learned judge having intimated his opinion that as The Bryn was taken from a separate landlord, it was to be considered as a virgin colliery, and not as a mine auxiliary to The Gellydeeg Mine, and that therefore the custom (if it existed) as to letting old mines furnished, did not apply, reserving, however, to the defendant, leave to move to enter a nonsuit, left three questions to the jury as to reputed ownership of the machinery and implements. Upon the first point, which related to the machinery and implements belonging to The Bryn Colliery, the jury found for the plaintiff; and for the defendant upon the second and third, which related to the machinery, &c. belonging to The Gellydeeg Colliery, which at the time of the bankruptcy were upon The Gellydeeg Colliery and The Bryn respectively.

In Michaelmas term last, *Ludlow*, Serjt. obtained a rule nisi for a nonsuit, or to reduce the verdict by the amount of the steam engine; against which *Campbell*, S. G., was about to shew cause, when he was stopped by the Court.

(a) 9 East, 215.

(b) 5 D. & R. 240; 3 B. & C. 368.

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Ludlow, Serjt., R. V. Richards, and Whateley, in support of the rule. It is clear from the case of *Horn v. Baker* (a), that in no case engines which are fixed to the freehold, can pass to the assignees under the description, in the statute, of goods and chattels in the reputed ownership of the bankrupt: therefore the steam engine at The Bryn Colliery certainly could not pass to the assignees. In the case of *Storer v. Hunter* (b), which was an action of trover, to recover the value of engines, &c. and other implements belonging to two collieries, brought by the assignees of a bankrupt who had held the two collieries under a lease from the defendant, the lease was of a colliery, with all the engines, machinery, and other implements, effects, and things then lying in or about the colliery, or used or employed therewith, and containing a proviso, that at the expiration or sooner determination of the lease, the lessee should yield and give up to the lessor all engines, machines, effects, and things belonging to and used in the said colliery; it was held, that the tenant never had, under this demise, the possession, order, or disposition of the fixtures or movable articles, within the meaning of 21 Jac. 1, c. 19, but a mere qualified right to use them during the term. Mr. Justice *Bayley*, in his judgment, alluding to the case of the possession of a furnished house, says, "In order to ascertain whether the party in possession is entitled to the character of owner (of the furniture), a further inquiry becomes necessary; for the possession being such, that he either may or may not be the owner, the party about to trust him is not entitled to conclude, from the mere possession, that he is owner. In such a case a purchaser is bound to inquire upon what terms the property was taken, and he ought also to inquire what the nature of the usage is in the place where the property is situate. Now this is the case of a ready-furnished colliery, if I may be allowed the expression, and as it appears that the machinery and other things on collieries sometimes belong to the landlord and

(a) 9 East, 215.

(b) 5 D. & R. 240; 3 B. & C. 368.

sometimes to the tenant, it must depend upon the bargain between the landlord and tenant, to what character the latter is entitled." If reference be made to the agreement entered into relative to The Bryn Colliery, it will be found that there can be no question but that, according to the bargain between the landlord and tenant, the tenant had no property in the furniture of the mine, but merely a qualified right to use it during the term. In *Clark v. Crownshaw* (a), which was a case somewhat similar to the present, the Court held that the assignees were not entitled to recover the fixtures, but that they were entitled to the movable goods. This, however, appears to have been decided on the ground of laches on the part of the lessors. There has been no neglect here on the part of the lessors.

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DENMAN, C. J.—I think there is nothing to take the steam-engine out of the case of *Horn v. Baker*.

LITTLEDALE, J.—I see no reason to deviate from the principle laid down in *Horn v. Baker*. The case of a steam-engine does not fall within the mischief to which chattels are open.

PARKE, J.—The steam-engine clearly does not pass to the assignees. I will not say that I came to this conclusion upon the principle that fixtures affixed to the freehold are not goods and chattels within the statute, as laid down in *Horn v. Baker*. The proper question, I think, is, whether the steam-engine was the absolute property of the bankrupt.

The parties having agreed that it should be referred to an arbitrator to compute the amount of the damages, the Court discharged the rule, with directions to the arbitrator not to include the value of the steam-engine in his award.

Rule discharged (b).

(a) 3 Barn. & Adol. 804.

fixed to posts let into the ground ;

(b) The sheriff cannot attach
a defendant by a table-dormant

Rast. Ent. 66 a ; S. P., T. 21
H. 7, fo. 26, pl. 4.

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DOE, on the demise of SMITH and others v. ANN
GALLOWAY.

By a demise of land situate at A. and now in the occupation of J. S., lying within certain boundaries, land within the boundaries passes, though not in the occupation of J. S.

EJECTMENT brought to recover possession of a house and garden situate in Blenheim Park, on three several demises, one by *Smith, Cleeve, and Southam*; one by *Marsh, Stracey, and Stewart*; and one by the Duke of *Marlborough*, which last demise was struck out pursuant to a judge's order.

At the trial before *Gurney, B.* at the Oxford summer assizes, 1832, it appeared that *Marsh, Stracey, and Stewart* were seised, under a writ of elegit, of one moiety of Blenheim Park. Upon this moiety stood the cottage and garden which had been for many years and still were occupied under the late and present Duke of *Marlborough* by the defendant. By an indenture of lease made in 1824, *March, Stracey and Stewart*, with the consent of the duke, demised, and the duke ratified, unto *Smith, Cleeve, and Southam*, "all that part of the park called Blenheim Park, or Woodstock Park, situate and being in the county of Oxford, and now in the occupation of *Richard Smallbones*, in a direct line across the said park, from the gate called Old Woodstock Lodge, leading out of the town of Woodstock into the said park, to a certain gate called Coombe Green Lodge, lying on the north-west side of the said line, and abutting on Coombe parish on the west, and on Wootton Park on the north, (here follow other parcels,) together with the farm-houses and other houses, structures, buildings, barns, stables, gardens, orchards, backsides, court-yards, curtilages, closes, and inclosures, ways, paths and passages, belonging or in any wise appertaining to the said premises, and which now are in the occupation of the said *Richard Smallbones*." *Smallbones* was a former tenant by elegit, of the same part of the park; but it appeared that *Mrs. Galloway*, the defendant, and her deceased husband, had been in the occupation of the premises for nearly 50 years, and that *Smallbones* had never occupied them or done any acts

of ownership over them; *Smallbones* also occupied the remainder of the park as tenant. It was objected by *Jervis*, for the defendant, that as the premises in question were not at the time of the lease of 1824, in the occupation of *Smallbones*, but were occupied by the defendant, they did not pass by that lease. The learned judge directed a verdict to be entered for the plaintiff, but gave the defendant leave to move to enter a nonsuit. In last Michaelmas term *Jervis* obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered instead thereof.

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Talfourd, Serjt. now shewed cause. The only question is, whether any thing passed by the lease which was not in the occupation of *Smallbones*. The premises are within the line described on the deed. Grammatically considered; the words used would imply that the *whole* of Blenheim Park was in the occupation of *Smallbones*, which was not the fact. In this case there is sufficient certainty in the description of the property intended to pass; and the reference to the occupation of *Smallbones*, which is untrue, cannot be admitted to destroy the effect of the description by boundaries; *Wrotesley v. Adams* (a); *Vicars Choral of Litchfield v. Ayres* (b). In *Hobart*, 171 (c), it is said, "In grants of particulars sufficiently once ascertained, another mistaking will not frustrate, though it be false. *Pas. 23 El. Dyer*, 376: One made a feoffment by attorney of 'a messuage in D. which was *Richard Cotton's*,' and indeed it was *T. Cotton's*, yet it passed, for else all was to be frustrate." Looking at the whole scope of this demise it is quite clear that it was intended to pass all that had been extended by the elegit. The words, "and now in the occupation of *R. Smallbones*," are connected with that which precedes, by the conjunctive participle "and;" the whole forms but one sentence, and therefore the whole is to be read toge-

(a) Plowd. 191.

(b) W. Jon. 437.

(c) *Stukeley v. Butler*.

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thier. There is no reason here why the house should not pass; there is nothing shewn from which it might be presumed that there was an intention not to demise the house in question. In *Doe dem. Ashworth v. Bower* (a), the devise was of "all my messuages, situate at, in, or near a street called Snig Hill, in Sheffield, which I lately purchased of and from the Duke of Norfolk, or his trustees." The testator had four houses about twenty yards from Snig Hill, and two houses about 400 yards from that street, all in Sheffield, purchased at once, conveyed by one conveyance, and included by the testator in one contract for redeeming the land tax. It was held that only the four houses passed. *Littledale, J.* in his judgment says, "Houses at or near Snig Hill would have passed by the former part of the clause, although some of them had not been bought of the duke, or his trustees, according to the rule; that where there is a sufficient certainty in a description, a false reference added shall not destroy its effect."

Jervis, K. C. and *Cooper*, in support of the rule. The objection is upon the words of the lease of 1824. The demise is of "all that part of the park called Blenheim Park or Woodstock Park, situate &c., and now in the occupation of *Richard Smallbones*." It is limited to the part in the occupation of *Smallbones*. [*Littledale, J.* It does not say, "that part of the park which is in the occupation of *Smallbones*; but all that part of the park called Blenheim Park, situate &c., and now in the occupation of *Smallbones*, in a direct line, and describing the boundaries." In the case in *Cro. Car.* 129 (b), the question was, whether the whole of a house passed to a devisee where the devise was of "the house or tenement wherein *William Nicholls* dwelleth, called the White Swan in Old Street." and it appeared that *W. Nicholls* did not occupy the whole house. The Court held that the description "that house or tenement, called the White Swan," necessarily included

(a) 3 Barn. & Adol. 453.

(b) *Chamberlaine v. Turner*,

the whole house, and that the words after "wherein *W. Nicholls* dwelleth," did not abridge or alter the devise. It was also said that the house being named by the particular name of the White Swan, although *W. Nicholls* had never inhabited therein, it would have passed by the devise. [*Parke, J.* The rule is laid down in a note to 2 Co. Rep. 33(a), where it is stated to be a general rule in the construction of grants and devises, that where there is sufficient certainty before by way of description of the thing granted, as by giving to a close a particular name, &c. there a subsequent mistake, as in the tenant's name, the number of acres or the rent, shall not hurt the grant.] The cases are collected in *Com. Dig.* tit. *Fait*, and *Viner's Abr.* tit. *Grant* (b). In *Com. Dig.* (c) it is stated, that if the grantor conveys all his lands in the tenure of *A.* in the parish of *D.*, it is not material that the first part of the description is true, if the whole is not so. *Doddington's* case is thus abstracted by Lord *Hobart* in *Stukeley v. Butler* (d). *Henry* the 8th being seised of the Hospital of Wells, whereof certain lands in Dindace, out of the circuit of Wells, which were in the tenure of *John Browne*, were part, granted unto *Ailworth* all his lands in the tenure of *John Browne*, situate in Wells, to the said hospital belonging. And it was adjudged that although the first part of the description, as it was placed in the patent "in the tenure of *Browne*" were true, yet the latter part (being false) marred all, even if it were the grant of a common person. [*Denman, C. J.* The question is, whether you must not resort to all the words of the demise to know what was the intention of the party demising. Suppose the demise had been of "all that part coloured green" in a particular map, the quantity would at once be ascertained by reference to that map, and it would be unnecessary to look at any other parts of the description. If it was necessary to shew that all parts of the description are true, then the position that

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(a) *Doddington's* case.(b) 14 Vin. Abr. 87, *Grant* Q.(c) *Fait*, E. 4.(d) *Hobart*, 171.

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falsa demonstratio non nocet, would not be correct. *Littledale, J.* Here we find a description by boundaries. The only argument there can be in this case, arises from the circumstance of the words, "now in the occupation of *R. Smallbones*," preceding the other part of the description.] It must be admitted that but for that the point would not be capable of being argued. The *first* description cannot be rejected. In *Doe v. Parkin* (a) a testator devised all his lands in T. then in his own occupation. The testator, at the time he made his will, was seised of some land in T. in his own occupation, and of other land in T. which was not in his own occupation. It was contended that the words in the will "now in my own occupation," were not restrictive of the generality of the terms of the devise. The Court held that the words were clearly restrictive, and that the land only in the testator's own occupation passed by the will. *Doe dem. Ashforth v. Bower* (b) is in fact an authority for the defendant; for there the Court adhered strictly to the *first* part of the description. [*Littledale, J.* It is the general rule that you are to take the *first* description. There would be greater difficulty in this case if the word "and," had not been introduced; if the words "now in the occupation of *R. S.*" had stood alone, the case might have been different, because then this grammatical construction would have been impossible.] It is submitted that the word "and," does not connect these words with the description of the whole park. It should be read, all *such* part of the park as is now in the occupation of *R. Smallbones*; and this construction is fortified by the following part, "together with the farm-houses and other houses, structures, buildings, &c. belonging or in any wise appertaining to the said premises, *which are now in the occupation of the said Richard Smallbones.*" It has been said that for the purpose of the lease, all is to be considered as having been in the occupation of *Smallbones*; but that is not so. In *Doe d. Freeland v. Burt* (c), the Court held that all

(a) 5 Taunt. 321. (b) 3 Barn. & Adol. 453. (c) 1 T. R. 701.

deeds are to be construed with reference to the subject-matter, and that therefore evidence may be received to regulate and explain a demise. Here, the evidence is against that construction of the lease which is contended for. If there had been any express exception of part, (as in *The Vicars Choral of Litchfield* (a), where the small tithes were excepted, out of a demise of tithes,) the case might have been different. But here there is no exception of any particular part.

The Duke of *Marlborough* is a party to the lease, and it is reasonable to suppose that there was an arrangement that certain portions should be retained for his purposes.

DENMAN, C. J.—This is a case of a lease, in which the land demised is clearly described by metes and bounds; which part of the description, if taken alone, would leave no doubt as to what was intended to pass. But it is sought to qualify this demise by restricting the demised land to that which was in the occupation of *Smallbones*. Upon reading this description it can hardly be possible to say that the description, taken altogether, means less than the whole of that part of Woodstock Park which lies within the bounds. I see nothing to raise any reasonable doubt upon this part of the instrument. Then afterwards there are these particular words, “together with all farm-houses, and other houses, structures, buildings, barns, stables, gardens, orchards, backsides, court-yards, curtilages, closes, and inclosures, ways, paths, and passages belonging or in any wise appertaining to the said premises, and which are now in the occupation of the said *Richard Smallbones*.” These general words being added only for the protection of the grantee, cannot qualify or restrict that which has been already clearly granted. The lease contains a clear description of the property intended to be demised; and any thing inconsistent with that description must be rejected as *falsa demonstratio*.

(a) Sir W. Jones's Reports, 435.

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LITTLEDALE, J.—I am entirely of the same opinion. The words, “now in the occupation of *Richard Smallbones*,” must be taken as following up the words “in the county of Oxford.” If the demise is to be taken to be restricted to that which was in the occupation of *Smallbones*, the passage must be read without the word “and.” This might induce a different construction. If the words “now in the occupation of *Richard Smallbones*,” are to be taken as the material part of the description, more will pass than is now contended for, because more was in the occupation of *Smallbones*.

The cases cited shew that the words of description are first to be attended to, and that words of suggestion added, may be rejected as *falsa demonstratio*. *Doe v. Earl of Jersey* (a). The case of *Chamberlaine v. Turner* (b) is similar to this. The description of the messuage in that case, by the name of the White Swan in Old Street, is similar to the description of the land here by the boundaries. It makes no difference whether the land is described by a particular name, or by the metes and bounds of all that would fall within that name, if it had been used.

PARKE, J.—I am also of opinion that this rule ought to be discharged. The rule of construction, both as to deeds and wills, (c) is sufficiently ascertained; where the property is sufficiently and particularly described, any subsequent suggestion may be rejected as *falsa demonstratio*; but where the description is general, any suggestion which follows may be admitted to restrict or qualify it. Here, if the description had been general, the words, “and now in the occupation of *R. Smallbones*,” might have been admitted to restrict the operation of the deed, so as to prevent the whole park from passing, and that part in the occupation

(a) 1 Barn. & Ald. 550; and afterwards in the House of Lords; 3 Barn. & Cressw. 870.

(b) Cro. Car. 129.

(c) See note (B) at the end of this volume.

of *Smallbones*, though north of the line, would have passed. Here, if the words apply to that part of the park only, and in evidence it turns out that the words "now in the occupation of *Richard Smallbones*," do not apply closely to the part previously described, but more is occupied by *Smallbones*, the words must be rejected as *falsa demonstratio*. In this case, there was clearly a *particular* description before; therefore these words may be rejected.

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Rule discharged (a).

(a) Vide *Fennel's case*, M. 7 E. 2, fo. 209.DOE *dem.* GWILLIM v. GWILLIM and HARRIS.

EJECTMENT for a dwelling-house, shop, and land, in the county of Gloucester, in the occupation of the defendants severally. At the trial before *Bosanquet*, J. at the Gloucester summer assizes, 1832, the following facts appeared:

In 1804, *Henry Gwillim* made his will in these words:


"As touching such worldly *estate* wherewith it has pleased God to bless me in this life, I give, demise, and dispose of the same in the following manner and form:

"First, I give and bequeath to my dearly beloved wife the woule of my *estates* and goods and chattels, and living stock, debts, during her widowship and no longer, to keep it in possession, nor by any husban or helpmate or company-keeper, or inmate, or by any person that take a lese of her life or lodger, but demeatly to go to my dear children as I have appointed and disposed to them in lots and in money:

"Second, to my son *Joseph Gwillim* I leave ten pounds of good and lawful money of Great Britain, out of my goods and chattels to be paid him:

"Thirdly, to my son *Henry Gwillim* I leave the pece of ground called by the name of Jamesis Patch, to him and

Under a devise of a house without words of inheritance, the devisee takes only a life estate, although by the will the devisor professes to dispose of his "worldly estate."

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his lawful aires for ever, and if no aires, to his next brother and his lawful aires for ever :

" Fourthly, to my son *George Gwillim* I leave the pece of ground called by the name of *Joneses Patch*, to him and his lawful aires for ever, and if no aires, to his next brother and his lawful aires for ever :

" Also to my son *James Gwillim* I leave the pece of ground called by the name of *Matthewses Patch*, and the pece of ground called by the name of *Dallamy's Patch*, to him and his lawful aires for ever, and if no aires, to his next brother and his lawful aires for ever :

" Also to my son *Samuel Gwillim* I leave the barn and the stables, and the low pece of ground next adjoining, called by the name of *Hemesses Patch*, and the other called by the name of *Clareer Patch*, to him and his lawful aires for ever, and if no aires, to his next brother and his lawful aires, for ever :

" Also to my son *Wilham Gwillim* Soulder I leave the pece of ground called by the name of the *Quarel Patch*, to him and his lawful aires for ever, and if no aires, to his brother *John Gwillim* and his aires for ever :

" Also to my son *John Gwillim* I leave my dwelling-house and nail shop and sider mill, stables, and pigscot, garden, brewhouse, and the pece of ground adjoining it; also my goods and chattels and living stock that I shall leave :

" Also to my daughter *Mary Leyrigo* I leave the house called by the name of the *Dancing House and Gardens*, and to her son *Henry Leyrigo* and his lawful aires for ever."

This will was properly executed and attested.

Henry Gwillim, the testator, died in 1817, leaving *Joseph*, the lessor of the plaintiff, his heir at law, and leaving his two other sons, *Samuel* and *John*, and his widow, him surviving.

The widow died.

1830.—*John Gwillim* was convicted of horse-stealing, and by a conveyance dated the 29th July, 1830, conveyed the property in question to the defendant *Samuel*.

The property lies within the Forest of Dean, and was

alleged to be an encroachment on the forest. In the 17th *Edw.* 2, c. 16, it is recited, that "it is used (a) in the county of Gloucester by custom, that after one year and one day the lands and tenements of felons shall revert and be restored to the next heir to whom it ought to have descended if the felony had not been done."

The learned judge left two questions to the jury; first, whether the premises in question were old incroachments made previously to 20 *Car.* 2, c. 3, s. 17, which prohibits further grants from the crown (b); secondly, whether the conveyance from *John* to *Samuel* was bonâ fide or fraudulent. The jury found that the deed was fraudulent, and that the land had been inclosed previously to the statute of *Car.* 2. Upon this the learned judge, being of opinion that by the will *John* took an estate for life, and that therefore the custom did not apply, directed the plaintiff to be nonsuited, but gave him leave to move to set aside the nonsuit and enter a verdict. In Michaelmas term last *Campbell* obtained a rule nisi to set aside the nonsuit and enter a verdict for the plaintiff, upon the authority of *Gall v. Esdaile* (c).

R. V. Richards now shewed cause. The question in this case is, whether *John* took an estate in fee, in tail, or for life. It is submitted that he takes only an estate for life, as there are no words of limitation in the devise to him. In *Esdaile v. Gall* (d), the words of the will were these: "As to the rest of my estate, the two houses in *S.* and the other in *F.*, I give to my loving wife *M. M.* for life; and after her decease, that in *S.* to my daughter *Mary M.*, the other between my two sons *J.* and *J. M.* to be equally divided: as to the rest of my estate of which nature soever, one-third to my wife, and the rest to be divided equally among the three children." The Master of the Rolls decided, that *Mary M.* took an estate for life only. But the

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First point:
Whether devisee took for life or in fee.

(a) In the original "De consuetudine tamen dicitur quod post annum et diem terræ et tenementa felonum Gloucestr' redduntur et revertentur proximo heredi cui

debuissent descendisse si facta non fuisset feloniam."

(b) Vide 3 Mann. & Ryl. 329 n.

(c) 8 Bingh. 323.

(d) 1 Russ. & Mylne, 540.

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Court of C. P. have since decided differently upon the same will in an action by a purchaser from *Mary M.*, to recover back deposit money (a). The Court of C. P. proceeded upon the ground that it was the testator's intention to give to his daughter all his *estate* in the house in S. But no former case can decide this will; the Court must put its own construction on each will as it arises.

Second point:
 Whether custom of Forest of Dean, giving lands of felon to his heir, applies to a case where the felon is still alive.

Supposing, however, that *John* took an estate in fee under the will of *Henry Gwillim*, still this question remains, whether this is a case within the custom. The custom, as set out in the statute of 16 *Edw.* 2, applies only to cases of attainder and execution, for it does not contemplate that the felon is still in esse.

Campbell, S. G. and *Busby*, contra. Here are words sufficient to carry an estate in fee. The will begins, "As touching such worldly *estate*." Then there is a devise to the wife of "the whole of my estate." If it had rested there, the wife would have taken the fee, but the testator cuts down her estate to an estate for life or during widowhood. Then follow these words, "but demearly to go to my dear children," that is, all his *estate*. If he had stopped there, the children would have taken as joint-tenants in fee; but then the whole is to go to his children in such lots as he had appointed. The testator then goes on to parcel out his estate amongst his children, and in doing so he gives to each of his elder sons estates tail, in the several portions allotted to them, with remainders over to their respective next brothers. *John* being the youngest of the brothers, the testator deems it unnecessary to use the same words of limitation, because there was no younger brother to take after him in case he should die without heirs. Upon the whole of this will it is clear that the testator did not intend to die intestate as to any part of his property, and there is no residuary clause. The word "*estate*" overrides the whole remainder of the devise, and that is enough to create an estate in fee; *Rowe v. Bacon* (b). It is to be

(a) 8 Bingh. 323.

(b) 4 M. & S. 366.

observed in the case of *John*, the testator couples the personal property with the realty, and it is clear that the personal property goes to *John* absolutely. In *Roe v. Pattison* (a), the testator devised "the remainder in the above stocks, with my freehold property, to my sister *Margaret Stoker*, and all other moneys due to me." It was held, that *Margaret Stoker* took a fee in the real estate; and from the observation of Lord *Ellenborough* it appears that the judgment of the Court proceeded upon the consideration that the testator had clearly given an absolute property in his stock, and that it was his intention to give an equally absolute estate in the freehold property. The words used in the will of *Henry Gwillim* seem in effect identical. *Rowe v. Bacon* (b), *Fenny v. Ewestace* (c), also throw considerable light upon the question, but the Court will not expect authorities precisely in point in a case of this sort, because of the infinite variety of modes in which persons of different ranks and circumstances express their intentions.

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DENMAN, C. J.—It is very difficult to apply any former authority, because the Court is bound to put its own construction upon each will as it arises; there being, however, some general rules of construction which guide the Court in construing the will. The case of *Gall v. Esdaile* does not apply. It is our duty to see what the testator means to do, and to carry his intention into effect, provided there are words in the devise which will bear such a construction. Are there in this will words sufficient to give to *John* an estate in fee? At first I thought that the word *estate* pervaded the whole will, but now I am of opinion that it does not, because in some of the devises the heirs of the devisees are specially named. Whatever may have been the testator's intention, I think there are no sufficient words to pass the fee, and that *John* took only an estate for life.

(a) 16 East, 221. (b) 4 M. & S. 366. (c) 4 M. & S. 58.

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LITLEDAL, J.—I am of the same opinion. The testator leaves all his estates to his wife during her widowhood. Then by what follows he shews that it was his intention to pass all his estates; but in doing so, he gives to several sons estates tail, and when he comes to *John*, says nothing about his heirs or his children, but uses words which will only pass an estate for life. Then it is said, that because he takes an absolute interest in the chattels, he shall have an estate in fee in the realty. Now this depends upon the intention, and I confess I cannot see what the intention of the testator was; perhaps he did not know himself: therefore all we can do, is to see what words are used. Here there is a devise to a man, without saying “and his heirs,” contained in a will which uses words of limitation in every other devise. These words give to *John* nothing more than an estate for life.

PARKE, J.—*John* takes an estate for life only. We must see what the testator meant, or rather, to speak more correctly, the rule is that we must inquire what the words of the will mean. Here it is difficult to say what even the testator himself meant. He grants four estates tail, then an estate to *John* simply, without words of limitation, and after that another estate to her daughter *Mary Leyrigo* and her son *Henry Leyrigo* and his heirs for ever. Thus the devise to *John* is between two other estates in which the heirs are named. This shews that the testator understood the meaning of words of limitation.

PATTESON, J.—I am entirely of the same opinion. It is not necessary to decide between the Master of the Rolls and the Court of Common Pleas, because the language used by the testator in *Esdaile v. Gall* is distinguishable from that of the will now before the Court. I am not disposed to carry the effect of the word “estate” further than has been done already. I doubt what was, in fact, the intention of

the testator; but whatever that may have been, the words have but one effect, and we must pursue that.

Rule discharged (a).

(a) And see *Doe d. Norris v. Tucker*, 3 Barn. & Adol. 473; *Doe d. Clarke v. Clarke*, 1 Crompt. & Meeson, 39; and the cases collected in 2 Powell on Devises, 3d edit. cap. 20, and in 10 Bythewood, by Jarman, 210. See also note (C) at the end of this volume.

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The KING on the prosecution of *BRINDLEY v. DEWHURST*.

THIS was an indictment for a libel, charging *Brindley*, who was the master of the workhouse at Mellor, in the county of Lancaster, with having cruelly treated a female pauper. The vestry of the parish in which the workhouse is situated having instituted an inquiry into the matter, and having satisfied themselves that the charges were unfounded, resolved to prosecute the defendant for the libel, in vindication of *Brindley's* character and of their own. A bill of indictment was accordingly preferred in the name of *Brindley*, and found at the quarter sessions. The whole expense of the prosecution was borne by the parish. The indictment was, at the instance of the defendant, removed into this Court by certiorari, and after conviction at the Lancaster spring assizes, 1833, a rule to allow the prosecutor his costs, under 5 *W. & M.* c. 11, s. 3, was obtained. *Alexander*, for the defendant, had, upon affidavits stating the above facts, obtained a rule to shew cause why the rule to allow costs should not be set aside; against which

A public body, at its own expense, prefers an indictment for a libel upon *A.*, one of its officers, in the name of *A.* as prosecutor. The defendant removes the indictment by certiorari, and is convicted. No costs can be awarded under 4 & 5 *W. & M.* c. 11, s. 3.

F. Pollock now shewed cause. *Brindley* is the party grieved within the meaning of the statute, by the act of the defendant in removing the indictment. Although the expenses of the prosecution were in the first instance borne by the parish, yet ultimately they must have been borne by *Brindley*, either wholly or in part as a rate-payer.

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Denman, C. J. then called upon *Alexander* to support his rule.

Alexander, *contra*. The statute 5 *W. & M.* c. 11, s. 3, enacts, that if a defendant, prosecuting a writ of certiorari, be convicted of the offence for which he was indicted, the Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be any civil officer who shall prosecute upon the account of any fact committed or done that concerned him to prosecute or present. In this case *Brindley* does not fill the double character of "the prosecutor" and "the party grieved or injured;" and, unless he do that, *Rex v. Cooke* (a) is in point to shew that he is not entitled to costs. He is clearly not the prosecutor in the necessary sense of the word, inasmuch as the vestry alone carried on the prosecution. In *Rex v. Edwards*, Hil. T. 1830, a point similar to the present was determined by this Court. That was a prosecution, directed by the Commissioners for watching and lighting the streets of Derby, for an assault upon one of their watchmen whilst in the discharge of his duty. The defendant removed the indictment by certiorari, and was subsequently convicted. An application by the prosecutor for his costs was resisted, on the ground of the prosecution having been directed and carried on by the Commissioners, and was on that ground refused. Nor is the present case within the mischief intended to be provided against by the statute in question. The object of the act was to protect, against liability to excessive costs, those who commence proceedings before a less expensive tribunal. Here, *Brindley* is not a person who has a greater expense entailed upon him by the act of the defendant in removing the indictment from a cheap to an expensive tribunal. He is clearly not liable to the attorney; for the retainer was given by the vestry, and the liability to costs would consequently

(a) 1 Mann. & Ryl. 526.

be upon them. It is, however, contended that *Brindley* will have to bear a portion of them as a rate-payer. But a rate for the purpose of meeting such expenses is illegal, and such a rate would be set aside on appeal. He is therefore not liable to be called upon to pay a single shilling, either in the character of rate-payer or as nominal prosecutor. If so, he is not within the purview of the act.

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DENMAN, C. J.—The case of *The King v. Edwards* appears to me to decide this case.

PARKE, J.—As to the question whether *Brindley* may be called upon to bear a portion of the expense as one of the rate-payers, it is not necessary to inquire further; for even if *Brindley* be a person grieved or injured by the removal of the indictment, he is only the nominal, and not the real prosecutor.

LITLEDAL, J. and PATTESON, J. concurred.

Rule absolute.

LOCKWOOD and WRIGHT v. SALTER and Wife.

COVENANT for the nonpayment of money secured to the plaintiffs by the wife, before marriage. The defendants pleaded, in bar of the *further* (a) maintenance of the action, that since the plaintiffs had declared and before the expiration of the time for pleading, the defendant, *Thomas Salter*, had been discharged under the insolvent debtors' act. General demurrer, and joinder.

By a discharge under the insolvent debtors' act, debts contracted by the wife of the insolvent, dum sola, are extinguished, and do not revive against her upon the death of the husband.

(a) See *Le Bret v. Papillon*, 4 East, 502.

That which is called "the separate property of the wife," consisting of property in which the legal ownership is in others, though held for her benefit, cannot, in a court of law, affect the operation of the discharge of the husband under the insolvent debtors' act, (or of his bankruptcy and certificate,) in extinguishing the antenuptial debts of the wife. If it could, the existence of such property should be replied specially to a plea setting up such discharge, &c. but would form no objection to such plea on demurrer.

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Cresswell, in support of the demurrer. This is an action in which the judgment would survive against the wife, and therefore, as against her, the discharge of the husband can be no bar. Where a wife has separate property, she is liable to be taken in execution upon a judgment against the husband and wife: *Chalk v. Deacon and wife* (a), in which reference is made to the case of *Pitts v. Meller et ux.* (b) and *Finch v. Duddin et ux.* (c), a case stronger than the present, for there the cause of action had arisen after marriage. In *Sparkes v. Bell and wife* (d), the Court determined that a wife possessed of separate property, who was taken in execution together with her husband, for a debt contracted by her before her marriage, was not entitled to be discharged, although her husband had obtained his discharge as an insolvent debtor. Here, the husband has been discharged under the insolvent debtors' act; but that does not suspend or annul the right of proceeding against the wife. If this plea were allowed, it would be in effect to overrule the case of *Sparkes v. Bell*. [*Parke, J.* Have you found any cases in bankruptcy upon this subject?] There is only one case upon a bankruptcy of the husband; and it is true that the decision in that case is in favour of the plea now pleaded; but it proceeds entirely upon a fallacy. The case is that of *Miles v. Williams et ux.* (e); the whole judgment in which proceeded on the ground that debts to the wife and from the wife stand on the same footing. With respect to debts due to the wife, the husband might have reduced them into his own possession, and so may his assignees do after his bankruptcy; but as to debts due from the wife, the case is different; for the separate estate of the wife, out of which these debts ought to be paid, will not pass to the assignees: *Bosvil v. Brander* (f). There is no reason why the wife should be in a better situation after her husband's bankruptcy than before it. Before the bankruptcy,

(a) 6 B. Moore, 128.

(b) 2 Str. 1167.

(c) 1b. 1237.

(d) 8 Barn. & Cress. 1.


(e) 1 P. Will. 249.

(f) 1b. 458.

her separate property would be liable for their joint debts; why not afterwards? This plea would go to bar the action for ever against both. Supposing in this case the plea were held good, and the husband died, there would be no power of afterwards suing the wife, whatever might be the amount of the property. [*Littledale, J.* The wife may plead separately from her husband. *Parke, J.* The effect of the discharge is to operate as a release. Now, if you had released the husband, would you not have released the wife also? *Patteson, J.* The argument seems to go to this; that if the action were allowed to proceed to judgment, you would have a right to take the wife in execution, and to detain her in prison: should you not have replied this?] The discharge does not release the debt: the act does not take away the right to sue, but merely to arrest or take in execution; (7 Geo. 4, c. 57, ss. 60 & 61.) But, supposing that the discharge does operate as a release generally; why, if it operates as a release of the debt of the wife, is she liable to be kept in custody for not paying it? If however she is not released she may be sued, and her husband, who must be joined for conformity, ought not, under such circumstances, to be allowed to bar the action by a plea of his discharge. It is not incumbent on the plaintiff to reply that the wife is still liable to be sued and taken in execution for the debt. The plea itself is bad, for non constat but that the wife is possessed of separate property, or may acquire it after judgment. The nature of the debt—it being a debt contracted by the wife before marriage, and now due from her jointly with himself—is such that the husband is not entitled to be so discharged from it that he may plead his discharge in bar. By the 60th and 61st sections, it is not intended to give him this privilege in such a case. [*Parke, J.* Would you not be entitled to come in and prove your debt? Indeed, supposing a dividend of eighteen shillings in the pound were to be paid, it would be very hard upon you if you could not do so; as, if you could not, you would be left,

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during his life, to your remedy against the husband, who, until he has paid off every debt, can have no property that does not pass to the assignees.] Conceding that the plaintiff *might* have come in, he is not bound to take the dividend. [*Parke, J.* In the case, *In the matter of M'Williams*, a bankrupt (*a*), Lord *Redesdale* has acted on the case of *Miles v. Williams*. *Patteson, J.* The 72d section gives married women a power to petition for their discharge upon executing a special conveyance and assignment of all their property over which they may have any power of disposition; but this power is given to a married woman only where she is a prisoner for debt. This favours the plaintiff's argument, because the wife could not be in prison unless there were a judgment against her. That clause was passed to remedy the difficulty raised in *Chalk v. Deacon*.] The husband might have pleaded alone, and thus have obtained all the benefit which the law intended to give. Therefore it may be inferred that the present plea is wrong.

Archbold, *contra*. The plea is good both as to husband and wife. The discharge is a bar as to the wife, at least during her coverture: indeed, in *Miles v. Williams*, *Parker, C. J.*, who delivered the judgment of the Court, thought it was a bar altogether. The cases which have been referred to do not bear upon the present point. Those were applications, after judgment, to discharge the wife, and the Court had only authority to discharge the husband. Where an action is brought against husband and wife, after the insolvency and discharge of the husband, to recover a debt due from the wife before marriage, and the husband pleads his discharge, the case is widely different. But it is said that the plea is bad, because non constat but that the wife has separate property. If it be an answer to this plea, that the wife has separate property, it should have been replied: whereas here the plaintiff, by

(*a*) 1 Scho. & Lefr. 173; *vide post*, 259, n.

demurring instead of replying, has admitted that she has none. But it would be no answer. If they had proceeded, they could have no execution. Their only remedy is in a Court of Equity; and the Court of Equity never proceeds against the person of the wife, but against the trustees of her separate property. Thus they seek to proceed against a person, against whom even a Court of Equity will not move. The plea of insolvency and discharge is completely equivalent to the plea of bankruptcy. The discharge and certificate are precisely the same in effect; and if the wife be discharged by the one, she is so by the other. *Miles v. Williams* is admitted to be in point, and it has been recognized (a) by Lord *Redesdale* in the case *In the matter of M^r Williams*, a bankrupt. The decision proceeds upon the principle that the debt is the debt of the husband, and may be proved against him. [*Patteson*, J. That does not shew that it is not also the debt of the wife. An action could not be maintained against the husband alone.] The debts due to the wife pass to the assignees under the insolvency of the husband, and if the husband dies before they are reduced into possession, they do not survive to her. It would be hard to say that the debts due to the wife should be liable to be distributed amongst her husband's creditors, and that yet those due from her should not be discharged by the insolvency. The 72d section has no reference to this case. It was introduced to meet the decision in *Chalk v. Deacon*. Before that act, if the husband and wife had been taken in execution together, the husband might have been discharged, but not so the wife, who, because she could not give a legal warrant of attorney that would be operative, might have been detained in prison without any court having the power to release her. The only operation of that clause is to remedy that evil.

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(a) It does not appear by the report, in 1 Schoales & Lefroy, that *Miles v. Williams* was there referred to either in the argument of counsel or in Lord *Redesdale*'s judgment.

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Cresswell, in reply. With regard to the alleged hardship of holding that the wife will not be discharged by her husband's certificate, that objection is at all events met by an equal hardship on the part of the wife's creditors, if it be said, that in case of her surviving, they shall not be entitled to require payment of their debts. It is submitted, that if the husband had died, she could not have pleaded this plea; and if the creditor could have recovered against her, after her husband's death, he ought to be able to recover during the husband's life also. [*Parke, J.* The husband gives up all the property, out of which the debt can be paid.] The wife may have property settled upon her to her separate use, and yet by this plea she would be discharged for ever. [*Parke, J.* The trustees cannot in any case be proceeded against except in equity. We have no equitable jurisdiction to touch her separate property.] The *legal* right is to have the custody of the person of the wife; the *equitable* jurisdiction, by touching her separate property in the hands of her trustees, would be exercised in her favour. The statute does not give to the *wife* the power of pleading the discharge; the 61st section says, "it shall and may be lawful for *such* person" to plead; now the wife is not *such* person. Such person is only the person who shall have become entitled to the benefit of the act "by such an adjudication as aforesaid." [*Parke, J.* Are there not the same provisions in the Bankrupt Act? (a) *Littledale, J.* We are beset with technical difficulties. In *Comyns's Digest* (b) it is laid down generally, that "in an action against husband and wife, both ought to join in a plea, and therefore if the wife alone comes and pleads, there shall be a replender;" and it is said also, "so, in assumpsit against husband and wife, upon a promise of the wife *dum sola*," for which *Cro. Jac.* 288 (c), is cited.] It is a statutable plea given under particular circumstances, and if the rule laid down in *Comyns* applies to this case, and this plea cannot be pleaded

(a) Section 126.

(b) *Pleader*, (2 A. 3,) pl. 1 & 6.(c) *Tampion v. Newson, et us.*, also reported *Yelv.* 310.


by husband and wife jointly, it cannot in any shape be good. If the intention was to relieve, where the party's property is given up, the plea is not within the principle.

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DENMAN, C. J.—I am of opinion that this is a good plea. The debt which this action is brought to recover, is one of the debts of the husband, and is therefore discharged. The same doctrine was laid down upon the Bankrupt Act in the case of *Miles v. Williams and wife*, which has never been overruled, but which, on the contrary, has been acted upon in a subsequent decision. With regard to the cases which have been cited, the Courts in deciding them do not seem to have entered upon principle, but only to have considered, in each particular case, whether the party on whose behalf the application was made, had done every thing which he could be fairly required to do. As all the wife's property vests in her husband during coverture, I do not ground my opinion upon any consideration as to separate property in the wife; and I agree with Mr. *Cresswell*, that the effect of our decision will be, that the discharge will endure, not only during coverture, but for ever.

LITLEDALE, J.—The case from *Cro. Jac. (a)* referred to by *Comyns*, shews that the husband and wife were bound to plead together, and that if they had pleaded separately it would have been a mere nullity, and a repleader would have been awarded. There is that technical difficulty. Then it is said that it would be hard upon the creditors, if upon the death of the husband they were not to have the right against the wife which they would otherwise have had; that is one of the consequences that occur from the relation of husband and wife, and it would be hard upon the husband if this plea were held not good. He has given up all his property, and even his future property has been assigned for the benefit of his creditors, and it would be a hardship

(a) More fully reported (as *Tampian v. Newsam and wife*;) by *Yelverton*, who was of counsel with the defendants.


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upon him if he were not discharged from debts due in right of his wife as from others; for otherwise he himself, or the wife, might be taken in execution after all the means of making payment had been taken from him. And it is right and proper too, that they should be held discharged; for the husband has given up to the creditors all that he possessed in right of his wife. With regard to the remedy against the wife surviving, after the death of the husband, that ought not to be. The creditors should come in and prove under the insolvency. Under all the difficulties of this case we have before us *Miles v. Williams*, in which a plea by husband and wife, of bankruptcy, was held good. I think that in law this operates as an absolute discharge. If it appears that in point of fact the wife possesses separate property, the creditor may go to a Court of Equity for relief. But there is no good to be gained from considering this now; we are sitting as a Court of Law.

PARKE, J.—I am also of opinion that this plea is good, and I think that this was decided by the case of *Miles v. Williams*, which was very well considered and decided by Lord *Macclesfield*. The case there was, that an action was brought against husband and wife upon a bond entered into by the wife before marriage, and the defendants pleaded in bar the bankruptcy of the husband since the accruing of the debt. And upon demurrer it was held that the plea was good, upon the ground that this was one of the husband's debts, provable under the bankruptcy. This is just as much the husband's debt, provable under his insolvency; and he has here, as there, given up all the property out of which the debt could be paid. This decision is founded upon good sense, and is correct in point of law, and moreover has been adopted by that very eminent lawyer Lord *Redesdale*. I will now offer a few observations upon some of the cases which have been referred to. In *Sparkes v. Bell and wife*, it is true, this Court refused to relieve the wife; but the point was not brought before the

Court as it has been to-day. It was not on that occasion argued that a discharge of the husband is a discharge of the wife; and although the case of *Miles v. Williams* and wife was cited in argument, it was not once referred to in the judgment. That was an application to the equitable jurisdiction of the Court, and they might well refuse to interfere where the wife refused to do equity, it appearing that she had separate property. If the question had been raised by an *audita querelâ*, the Court might have decided otherwise. In *Chalk v. Deacon and wife*, it does not appear that the husband had ever applied for his discharge at all, but only that the wife had done so; and the Court held, that upon the then act of parliament they had not authority to discharge her, because she could not execute a legal warrant of attorney. In consequence of this defect in the old act, the 72d section was introduced into the new act, and applies only to cases where the wife is in prison, to enable her to petition. With regard to the question of equity, we have nothing to do with that. Where the wife herself applies to be discharged, she may, under the 72d section, execute a conveyance, by which any property held in trust for her will be vested in the assignees; that is the only case in which she is enabled so to do. If the wife has any separate property, it must necessarily be in trustees appointed by some settlement or other instrument, and with them we cannot interfere. It seems to me that the wife is as effectually discharged as if the creditors had executed a *release* to the husband.

PATTERSON, J.—I am entirely of the same opinion, and I ground my opinion solely on *Miles v. Williams and wife*, which was fully discussed. I feel myself bound by that decision, which indeed has also been recognized by the case in *Schoales* and *Lefroy*. I do not mean to say that I fully concur in all the reasons which were given for the decision, and it is indeed scarcely reconcilable with *Sparkes v. Bell and wife*; but still I feel bound by the decision. With

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respect to the case of *Sparkes v. Bell*, I think if *Miles v. Williams* had been more considered, the decision would have been different. But, however, that certainly was an application to the equitable jurisdiction of the Court, and not a matter upon the record. If a wife were in custody now, and applied under the 72d section to be discharged, I do not see why the Court might not now refuse to discharge her, in order that the creditors might get possession of her separate property, under the provisions of that section. I do not say what might be the effect of a replication of separate property, but that course has not been taken here. The defendants have pleaded a general plea of the discharge, which certainly is a protection to the husband personally.

Judgment for the plaintiff (a).

(a) See *Briacoe v. Kennedy*, cited 1 Brown's C. C. 18.



DOE, dem. WILLIAM WILLIAMS and others,
 v. G. R. MATTHEWS and others.

Under a power to demise certain lands, reserving the ancient rent, a demise made of those lands jointly with others at an entire rent, is void.

EJECTMENT brought to recover two farms *A.* and *B.*, and two fields *C.* and *D.*, and two allotments of common, all in the parish of Dolgelley, Merionethshire. The cause was tried at the spring assizes for the county of Merioneth, 1832, before *Bosanquet, J.*, when a verdict was taken for the plaintiff for all the premises sought to be recovered, such verdict to be confined to *C.* and *D.*, if this Court should so think fit, upon the following case :

19th July, 1773. *Lewis Nanney* being seised in fee, by his will of this date, devised to his wife during her widowhood, remainder to his eldest son *Robert Nanney* for life; remainder to trustees to support &c.; remainder to the first son of *Robert Nanney* and *Jane* his wife, in tail; remainder to other sons in tail; remainder to their eldest daughter in tail,

with divers remainders over. In this will there is a power to the testator's son, when entitled in possession, to all or any part of his real estates, by virtue of that will, to make any lease or leases, demises or grants, of such part or parts of his real estates (except his capital messuage or tenement and lands called Llwyn,) usually let or then let to farm, unto any person or persons for one, two, or three life or lives, or for any term or number of years not exceeding 21, or for any term or number of years determinable upon one, two, or three life or lives in possession, and not by way of future interest, so as upon every such lease, grant, or demise made of such part of the said premises as had been usually let or should be let at the time of the testator's decease, there should be reserved *the like rents, services, heriots, and profits, as were then reserved, or more, with other restrictions &c.*

1779. *Lewis Nanney*, the testator, died.

1787. The testator's widow died, and *Robert Nanney* entered upon the devised estates, as tenant for life.

1784. *Jane*, the wife of *Robert Nanney*, died, leaving by him an only son *Lewis*, and two daughters, the eldest of whom married *Thomas Hartley*, one of the lessors of the plaintiff, and has issue.

4th September, 1800. By indenture of lease, with livery of seisin indorsed, between *Robert Nanney*, described as eldest son and heir at law, and also a devisee named in the will of *Lewis Nanney*, of the first part, and *George Matthews* of the other part, in consideration of the yearly rent therein reserved, and of the covenants, provisoes, and agreements therein contained, on the part of *Matthews*, his executors, to be observed and performed, the said *Robert Nanney* demised to the said *George Matthews*, his heirs and assigns, the two farms *A.* and *B.* for the lives of *G. Matthews*, his son and daughter, and for the life of the survivors. Yielding and paying unto *Robert Nanney*, his heirs &c., the clear yearly rent of 35*l.* The lease contained other reservations and covenants in pursuance of the requisitions contained in the will.

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10th April, 1813. By indenture between *Robert Nanney*, by the same description, of the one part, and *G. Matthews* of the other part, *Robert Nanney* demised to *G. Matthews*, his heirs and assigns, the said two farms of *A.* and *B.*, and also the two fields *C.* and *D.*, for the lives of three persons now living; yielding and paying to *Robert Nanney*, his heirs &c., the clear yearly rent of 40*l.*, and also yielding &c. according to the other provisions of the power.

1818. *Robert Nanney* died.

Two of the lessors of the plaintiff, *William Williams* and *John Williams*, were assignees by way of mortgage, of a term of 500 years, created by the will of *Lewis Nanney*.

1820. *Lewis Nanney*, the grandson, died, and the estate tail of the plaintiff, under the will of *Lewis Nanney* the testator, descended to his sister *Mrs. Hartley*.

G. Matthews, the lessee, died in 1828, having by his will appointed the two defendants, *G. R. Matthews* and *J. Matthews*, his executors.

The defendant *William Evans* occupies as tenant under *G. R. Matthews* and *J. Matthews*.

The two allotments of common had been originally made in respect of the farms *A.* and *B.* then leased as above to *G. Matthews*, and it was admitted that the right to them would follow the right to those two farms.

C. and *D.* were before and at the time of the death of *Lewis Nanney*, the testator, a part of the demesne lands called *Llwyn*, and therefore within the exception in the power.

A. and *B.* were let by *Lewis Nanney* the testator, in the year preceding his death, at yearly rents, amounting together to 29*l.*

The question for the opinion of the Court is, whether, under these circumstances, the verdict for the plaintiff ought to stand for all the premises sought to be recovered, or for *C.* and *D.* only.

J. H. Lloyd for the plaintiffs. A portion of the premises

demised is excepted out of the operation of the demising power, and an entire rent is reserved ; the lease is void not only as to the two fields which *Robert Nanney* had power to demise, but also as to the remainder, *Doe v. Rendle* (a). That case is founded upon Lord *Mountjoy's* case (b), which is indeed still stronger, for there a rent of 12*d.* was added in respect of a particular portion of the lands demised, and could therefore have been separated from the remainder. Another point is intended to be raised, which is, that if this lease of 1818 be void, there is no implied surrender of the lease of 1800. That lease was produced in evidence only for the purpose of shewing what amount of rent had been reserved in respect of the *A.* and *B.* alone. The point as to the failure of the implied surrender, was not raised at the trial, or it might have been met by evidence of an actual surrender. It cannot therefore be raised now ; *Roë v. Archbishop of York* (c).

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Welsby, contra. In *Doe v. Rendle* the reservation was directed to be of 'the ancient and accustomed yearly rent,' so that under the terms of that power it was impossible that there could be any apportionment of the rents. Here, by the terms of the power, the reservation is to be of the like rent &c. as were reserved at the time of making the will *or more*; so that the amount of the rent to be reserved is not ascertained by the power itself, as in *Doe v. Rendle*. Upon a reference to the lease of 1800, it is seen that the rent reserved upon that demise, which was of the two farms only, is 35*l.*, and it is fair to presume that the additional 5*l.* reserved in the second lease, was for the rent of the additional land demised by it. In the cases in which the Courts have held leases void, the reason has been that the evidence of the ancient rent would be destroyed, *Mr. J. Dampier* in *Doe v. Meyler* (d); a reason which cannot have place where the rent is capable of being apportioned to the

(a) 3 M. & S. 99.

(b) 5 Co. Rep. 3 b; *post*, 269.

(c) 6 East, 86; 2 Smith, 166.

(d) 2 M. & S. 276.

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several parcels demised. [*Parke, J.* The facts stated in this case do not shew what the apportionment would be.] This may be collected from a comparison of the first lease with the second. In *Doe v. Meyler* there was a lease of lands of which lessor was seised in fee, jointly with lands to which he was entitled only for life, with a leasing power which was not in this instance well executed; and the Court held that the lease was good after his death for the lands of which he was seised in fee, though bad as to the remainder. *Dampier, J.* at the trial, inclined to think that the rent, being entire, could not be apportioned, and that therefore the lease was wholly void. But, upon argument before this Court, it was held otherwise, and that the rent might be apportioned. In *Co. Lit.* 148 b., which is referred to in the judgment to that case, it is laid down, that if a man be seised of two acres, of one in fee, and of another in tail, and makes a lease for life or for years of both acres, reserving a rent, the donor or lessor dieth, the issue in tail avoideth the gift or lease, the rent shall be apportioned. Why may not the rent be apportioned here between the issue in tail and the lessee of deceased devisee for life with leasing power, as well as there between the issue in tail and the lessee of deceased tenant in tail? [*Parke, J.* In *Doe v. Meyler* the lease was good during the life of the lessor as to the part in tail because of the estoppel, but it was not good against the remainder-man.] In the last edition of *Sugden* on Powers (a), it is said "suppose an estate to be held in undivided moieties, and the same person to be seised in fee of one moiety, and tenant for life with a power of leasing, of the other; and suppose him to make a lease of the entirety at an entire gross rent, it seems that upon his death the rent would go according to his several interests in the land, that is, one moiety with the settled portion of the estate, and the other moiety with the unsettled; and that if the rent were sufficient in amount, the power would be well executed." For this position Mr. *Sugden*

refers to the case of *How v. Whitfield* (a). In all the leasing powers which have come before the Courts, the instrument by which the power was created has required, as in *Lord Mountjoy's* case (b), that the ancient rent should be reserved. [*Parke, J. Doe v. Meyler* is like the case of a man leasing together lands to which he has title, and others to which he has none, and an eviction taking place.]

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Upon the second point, it is submitted that the Court will not imply that the first lease was surrendered upon the execution of the second; and if the first term may be taken to be a still subsisting interest, it is sufficient to support the defendant's possession in this ejectment.

Lloyd was not called upon by the Court to reply.

DENMAN, C. J.—This is a perfectly clear case. *Doe v. Rendle* is quite conclusive upon the first point, and as to the second, it is sufficient to say that it is not now raised. The verdict must stand for the whole of the premises.

The other Judges concurred.

Rule discharged.

(a) *Powell on Powers*, 567.

(b) *Ante*, 287.

CLEMENTS v. LANGLEY.

ASSUMPSIT for money paid for the defendant's use. Plea: 1st, non assumpsit; 2dly, a general plea of bankruptcy under 6 *Geo. 4*, c. 16, s. 72; on both which pleas issue was joined; 3dly, a special plea of bankruptcy, alleging (c), that before the issuing of the commission, and also before the defendant had committed any act of bankruptcy, the plaintiff had become and was liable for a debt of the

A. surety with *B.* for *C.*, is compelled to pay the debt after the bankruptcy of *B.* The certificate of *B.* is no answer to the action of *A.* for contribution.

(c) For a concise mode of stating the formal proceedings under the commission, *vide* Mann. Exch. Pract. 251, 2d edition.

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defendant, to *Richard Clark, Esq.*, the chamberlain of London, secured by the bond of the defendant dated 23d December, 1826, which was delivered by the defendant to the chamberlain, and at the time of the issuing of the commission remained in the hands of the chamberlain, being a creditor of the defendant; that such debt had not been proved under the commission: that the plaintiff so being liable as aforesaid, after the issuing of the commission and before any dividend had been made under the same, paid the money in the second count of the declaration mentioned, being the debt for which he was so liable to the chamberlain: that the creditors who had not then proved their debts, could at the time of such payment have received, and might yet receive under the said commission, a dividend in proportion to their respective debts without disturbing any dividends already made.

Replication, that the plaintiff before the issuing of the supposed commission in that plea mentioned, and before the defendant had committed any act of bankruptcy, had not become nor was liable for the supposed debt of the defendant in the third plea mentioned, in manner and form &c. Upon this issue was joined.

At the trial before *Denman, C. J.* at the London sittings after last Michaelmas term, the following facts appeared:

By bond of 23d September, 1826, one *Robert Channell*, and the plaintiff and defendant and two other persons, (as sureties for *Channell*), became bound to *Richard Clark, Esq.* chamberlain of London, and his successors (a), in the penal sum of 200*l.*; the condition of which bond, after reciting that *Channell* had applied to the lord mayor and others, the

(a) This officer is a corporation sole by custom, who may take a recognizance, obligation, &c., for money belonging to an orphan, or to a matter under his care, which goes in succession, and not to his executors or administrators; vide *M. 8 E. 4*, fo. 18, pl. 29; *Bird v.*

Wilford, Cro. El. 464, 682; *Fulwood's case*, 4 Co. Rep. 64 b, 65 a.

So, by statute, the president of the college of physicians may have a writ of scire facias quare executionem non upon a judgment recovered by his predecessor. *Atkins v. Gardener*, Cro. Jac. 159.

then trustees under the will of *Samuel Wilson*, Esq., for the loan of 100*l.*, and that they had directed *Richard Clark*, Esq. the chamberlain of the city of London, to advance the sum of 100*l.*, upon the terms and conditions thereafter mentioned, was declared to be, that if *Channell*, his heirs &c. should pay to the chamberlain or his successors, the principal sum of 100*l.*, with interest for the same, for and during such and so long time as the said trustees should think proper to permit and suffer *Channell* to keep and use the said principal sum of 100*l.*, at and after the rate and in the manner following; that is to say, &c. such interest to be paid by equal half-yearly payments; and in case *Channell* should at the end of five years, in case the trustees should so long permit and suffer him to keep and use the sum of 100*l.*, well and truly pay unto the chamberlain of the city of London the whole principal sum of 100*l.* so lent and advanced to him, together with all interest due thereon; and also in case the trustees should be minded or think proper to call in and receive the said principal sum of 100*l.*, together with all interest then due for the same; then if *Channell*, his heirs &c. did and should, within twenty-one days next after demand, well and truly repay and return unto the chamberlain of the said city, for and on account of the said trust, the said principal and entire sum of 100*l.* so lent and advanced as aforesaid, together with all interest then due thereon, then the obligation should be void, otherwise &c. Upon the bond were indorsements of the receipt of one year's interest, due on December 23, 1827 and 1828 respectively, and also of the receipt, on the 11th October, 1830, of 3*l.* 10*s.* for interest for $1\frac{1}{2}$ year, and of the whole principal money of 100*l.* from the plaintiff and the two other co-sureties. The commission against the defendant was dated 20th August, 1829, and his certificate was signed on the 23d November, 1829. No application for payment of the principal was made by the obligee to *Channell*, until 26th May, 1830, and the sureties themselves were not called upon to pay until the

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10th September, 1830. The defendant, upon being called upon to contribute his proportion of 100*l.* and 3*l.* 10*s.*, refused to do so, on the ground of his having become bankrupt since the execution by him of the bond, and the other three sureties were each of them in consequence obliged to pay and did pay 34*l.* 10*s.* in lieu of 25*l.* 17*s.* 6*d.*, which would have been their respective proportions, if the defendant had joined with his co-sureties in satisfying the bond. This action was brought by the plaintiff to recover from the defendant the sum of 8*l.* 12*s.* 6*d.*, being the surplus amount which the plaintiff had been obliged to pay owing to the defendant's default. The jury, under the direction of the learned judge, found a verdict for the plaintiff, damages 8*l.* 12*s.* 6*d.*, but leave was given to move to enter a nonsuit. *White* having obtained a rule nisi in Hilary term following,

Platt and *W. H. Watson* now shewed cause. The question here is, whether this case falls within the 52d section of 6 *Geo.* 4, c. 16(a). It is clear that if the defendant had not become bankrupt, he would have been liable to each co-surety to the amount paid beyond one-fourth; and it is

(a) Which enacts, "that any person who at the issuing the commission shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, if he shall have paid the debt, or any part thereof, in discharge of the whole debt, (although he may have paid the same after the commission issued,) if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends, and all other rights under the said commission which such creditor possessed or would be entitled to in respect of such proof; or if the creditor shall not have proved under the commission, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment, as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, liable or bail as aforesaid, after an act of bankruptcy committed by such bankrupt: Provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed."

submitted that the 52d section of the Bankrupt Act does not make this a debt provable under the commission. The section applies only to cases where the bankrupt is the principal, and where the debt would at some time or other become due from him. The plaintiff and the defendant in this case, at the time of the bankruptcy, were co-sureties for *Channell*. It was then uncertain whether they would be called upon at all to pay, for they were not bound to pay except after default in their principal. How can it be said that the plaintiff was surety for a debt of the defendant, and that in that character he paid the defendant's debt? The section plainly shews that it was the object of the legislature to protect sureties of principal debtors; the words used are intended to apply only to cases where the bankrupt, upon obtaining his certificate, would be discharged from the debt. This was not the debt of the defendant; nor was it a debt which was capable of being proved under the commission, in which case alone it would be discharged by the certificate. [*Patteson*, J. It was put at the time of moving for this rule, that the bond was forfeited at the time of the bankruptcy, by the non-payment of interest half-yearly, according to the terms mentioned in the condition of the bond, and that therefore the bond was provable under the commission.] The sureties were not liable; it was not a debt until the parties had been called upon to pay. The criterion is, whether the debt was provable under the commission. In *Alsop and another v. Price*(a), the bond and condition were similar to the present, and the action was brought by the surviving obligee against the defendant, one of the sureties, who had become bankrupt, and had obtained his certificate. It was admitted that the bond had not been forfeited by the breach of any of the stipulations in the condition till after the bankruptcy, and the question arose whether at the time of the bankruptcy this was or was not a debt which could have been proved under the commission. Lord *Mansfield*, who delivered the opi-

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(a) 1 Douglas, 160.

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nion of the Court, said, "We think this was not a debt which could have been proved under the commission, for the defendant was not originally the debtor. It was not a debt to be paid by him in futuro at all events, but depended on the acts of the principal, viz. whether he did or not comply with the stipulations in the condition of the bond." This shews that the obligee, if he had not been satisfied, could now recover against the defendant. The condition of the bond here is not such that the sureties can upon forfeiture be considered as sureties for each other. The money was payable, not upon a specific day, but upon a contingency, viz. when the trustees should think proper to call it in. There was, it is true, a limit of five years, but that had not expired at the time of bringing the action; and the condition as to interest was, that it should be paid half-yearly, if the trustees should think proper to continue the loan so long. There was no breach of the condition as to the principal money, until after the bankruptcy; and it is submitted that the part of the condition which relates to the payment of interest, was not at that time broken; for though the money had not been paid at the day when it became due, it was paid before the bankruptcy (*a*). Supposing the interest to have been due it was provable, but having been paid, there could be nothing to prove. Where the breach of condition has been satisfied, you cannot prove under the commission. [*Littledale, J.* In cases of annuity bonds, it has been held that a forfeiture by non-payment at the day, although the arrears have been paid before the bankruptcy, made the principal sum provable. *Parke, J.* So also in the case of a bond to replace stock, a breach by the non-payment of dividends has been held to make the debt itself provable. *Patteson, J.* In *Wood v. Dodgson* (*b*), it was decided that a defendant might plead his certificate in discharge of an action brought under these

(*a*) The last half-yearly payment of interest, which accrued in June, 1829, before the bankruptcy, appears not to have been paid until after the bankruptcy; *vide ante*, 271, 272.
 (*b*) 2 M. & S. 195.

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circumstances. The two plaintiffs and the defendant, who were partners as warehousemen, dissolved partnership, and by deed the plaintiffs assigned to the defendant all their shares in the partnership debts and effects, and he covenanted to pay all debts then due from the partnership, and to indemnify the two from the payment of such debts. The defendant afterwards became bankrupt, and obtained his certificate, and the plaintiffs having been obliged to pay a partnership debt, brought their action against the defendant upon his covenant. *Parke, J. Wood v. Dodgson* has been acted upon in several cases. There was a case in the Common Pleas, and another in this Court.] This was not the debt of the bankrupt at the time of the bankruptcy. The cases contemplated by the act are cases where the principal debt was the debt of the bankrupt; that might have been the case with partners. In the case of *Wood v. Dodgson*, the party had rendered himself liable by the covenant to indemnify. *Browne v. Lee* (a) was upon the 17th section of 49 Geo. 3, c. 121, which enables an annuity creditor to prove under the commission, and makes the certificate of a bankrupt a discharge of his annuity. The Court, looking entirely at the relation of principal and surety, held that one of the co-sureties for the payment of an annuity, who had paid money on account of the annuity after the bankruptcy of a co-surety, might recover against such co-surety in an action for contribution, although he had obtained his certificate, because there was no means of ascertaining the interest at the time of the bankruptcy of one co-surety, who was only liable to pay in case of default of his principal, and might not be called upon to pay at all. Here, *Channell* is the principal, the others are mere sureties; at the time of the bankruptcy there was no debt. *Channell* might have paid the debt notwithstanding the bankruptcy, and then all the parties would have been exonerated. Therefore there was nothing properly provable under the commission. The debt of *Channell* was moreover not

(a) 6 B. & C. 689.

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wholly upon bond, but upon the original loan, which was to *Channell* only, and therefore there was no debt from plaintiff and defendant, until there had been a default in payment by *Channell*.

White, contra. This rule was moved for upon the ground that this was a debt due from the defendant to the trustees at the time of the commission being issued. The 51st section of the bankrupt act is in these words: "And be it enacted, that any person who shall have given credit to the bankrupt, upon valuable consideration, for any money or other matter or thing whatsoever, which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note, or other negotiable security or not, shall be entitled to prove such debt, bill, bond, note or other security, as if the same was payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest for what he shall so receive, at the rate of 5 per cent., to be computed from the declaration of a dividend to the time such debt would have become payable, according to the terms upon which it was contracted." This comes within the terms of the act. Here was a bond not payable until a certain number of days after the bankruptcy. One argument appears to treat this as a debt upon a *contingency*; but the money is payable a certain number of days after demand, and therefore the debt is not contingent. But, supposing that it is a debt upon a contingency, the case of *Ex parte Myers* (a) shews that, even if contingent, it is provable. The case on the other side rests mainly on the argument that the debt was only contingent. But certum est quod certum reddi potest. In *Aflalo v. Fourdrinier* (b), Lord C. J. *Tindal* considered liability to the debt to be sufficient, although the party were not, strictly speaking, a surety;

(a) 2 Montagu & Bligh, 229.

(b) 3 M. & P. 748.

Ex parte Smith (a). It is not necessary to contend that these four persons were sureties for each other; but it is submitted that the plaintiff was liable to the debt which the bankrupt owed to the trustees. In *Wood v. Dodgson, Le Blanc*, J. says, "Before the act, the original debt would have been barred by the certificate; and the remedy proposed seems to have been, that when any person at the issuing of the commission should be surety for or liable for the original debt of the bankrupt, the bankrupt should be relieved in the same manner from all claims of such person arising out of the original debt, although the cause of action arose after the bankruptcy." Here, there was an original debt of the defendant before the bankruptcy, for which the plaintiff was liable.

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DENMAN, C J.—I am of opinion that the bankrupt's certificate is no bar. The question is, whether the money ultimately paid is money paid to the use of the bankrupt in such a way as could be proved under the commission. I think it is impossible to say that the money advanced by the plaintiff could have been so proved. (His lordship, after reading the words of the section, proceeded)—I must own that I think it would be carrying these words too far to engraft upon them the liability of one co-surety to pay the portion of another, in the event of the principal on some future occasion making default in payment. There was here no debt capable of estimation in order to its being proved, because two contingencies were to be taken into consideration; first, whether the original debtor would not himself pay the debt; and secondly, whether this defendant would ever be called upon to pay it. I do not see how it is possible to say that any such debt existed between these parties as could have been proved under the commission.

LITLEDALE, J.—I am of the same opinion. The words of the 52d section do not apply to a co-surety, and I

(a) 4 Madd. 477.

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think that neither the plaintiff nor the defendant could be considered as *sureties* for each other. Upon the bond it appears that *Channell* is the principal, and it is his debt. I have considerable doubts whether the liability of this plaintiff was a liability as surety for the defendant, because although in point of law the bond was forfeited before bankruptcy, and an action might have been brought against all or any of the obligors, yet if the plaintiff had been compelled to pay the whole and had afterwards sued the defendant, the jury would only have assessed the damages at one quarter of the sum which the plaintiff had been so compelled to pay. This case is very different from *Wood v. Dodgson*, where the question arose between partners, who were there considered as in the nature of *sureties* for each other. Upon the whole, I do not think that this was a debt provable under the commission, although in strictness the bond was forfeited before the bankruptcy; for if judgment had been recovered, it would have stood only as a security. I do not think that this falls within the case as to annuities, for the value of an annuity may be ascertained; but I do not see how any value could be put upon any debt as existing between these parties. This is not at all the subject of a valuation.

PARKE, J.—I am also of opinion that this certificate is no bar. I would gladly have come to the opposite conclusion, if I could have done so upon satisfactory grounds. In order to make the certificate a bar, the surety must be liable for some debt *of the bankrupt*, and it must be a debt provable under the commission. It appears to me that a person who is a co-surety with the bankrupt cannot be considered as liable for a debt of the bankrupt. The plaintiff was liable for the debt of *Channell* only. Then Mr. *White* says, that the bond having been forfeited, there was a debt; but I think that forfeiture did not give the plaintiff a right to prove: there was no means of ascertaining what was due, and the interest was paid before the

bankruptcy. Then, as to the principal, that was not to be paid until twenty-one days after demand, and it must have been quite uncertain at what time that would become due. This does not fall within any of the decided cases; *Ex parte Fisher* (a), *Salmon v. Miller* (b), *Taylor v. Young* (c). It was impossible to say here what was due with respect to the principal borrowed. The whole might be repaid by the borrower. The amount of the bankrupt's liability could not possibly be ascertained. Therefore I think that there was no debt due from the defendant, at the time of suing out the commission, for which the defendant was liable as surety. No case has gone so far as to decide that the liability of a co-surety is similar to that of a surety. His lordship also referred to the judgment of Lord Eldon, C., in *Ex parte Hunter* (d).

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PATTESON, J.—I also think that the certificate is no bar, and that the rule must be discharged. I was in the course of the argument struck with the analogy to *Wood v. Dodgson*; and I still think that if the whole of the principal had been due, this case would have been within the 52d section. Here, however, nothing was due but a small arrear of interest, and that has since been paid, and is therefore no part of this demand. *Browne v. Lee* does not apply. That was a decision in respect of an annuity, upon the 49 Geo. 3, c. 121 (e), which statute contains no such provisions as are found in 6 Geo. 4, c. 16, s. 52. I therefore do not see how the plaintiff can be said to have been a surety for the defendant in respect of a debt to which he was liable before the bankruptcy.

Rule discharged.

(a) 3 Maddox, 159.

(b) 4 Mann. & Ryl. 551.

(c) 3 B. & Ald. 521.

(d) 2 Glyn & J. 7, 13.

(e) Sect. 17.

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**THOMAS MORGAN, JOHN RING and NICHOLAS MAUGHAN,
Assignees of SHIRLEY, a Bankrupt,
v. JONATHAN BRUNDETT.**

A preference, by an insolvent trader, to a particular creditor, is not fraudulent, if originating bonâ fide in the urgency of the creditor.

TROVER, by assignees under a commission of bankrupt, for the value of plate deposited by the bankrupt with the defendant, within two months before the issuing of the commission. At the trial at the adjourned sittings in London after Michaelmas term, before *Denman, C. J.*, a verdict was found for the plaintiff; the damages subject to be reduced to 1s. upon the re-delivery of the plate. The facts proved are these:—

The bankrupt, formerly in partnership with *James Smith*, and latterly by himself, carried on the business of a wine merchant in Bridge Street, Blackfriars, under the firm of *Smith and Shirley*, and resided at Chatham Place, in the neighbourhood. On the 4th and 18th August, 1831, meetings of the bankrupt's creditors were held at his counting-house, at which the defendant was not present. Either on the 23d or 24th August a similar meeting took place, at which several principal creditors and the defendant, as solicitor for the bankrupt, attended. The bankrupt having intimated that a negotiation was pending which he expected would end in the formation of a partnership between himself and *A. B.*, the meeting was adjourned, to afford an opportunity for the prosecution of that object, but upon a distinct understanding between the creditors and the bankrupt and defendant, that pending such negotiations no payments or preferences should be made. No intimation was at that meeting made by the defendant of his being a creditor. On the 24th of August the bankrupt directed his cellarman to convey two boxes of plate from his private house to the chambers of the defendant, in the Temple, which was accordingly done. On the 20th of October, 1831, the present commission issued. On his examination, the bankrupt stated that he had paid two

dividends of three shillings and one shilling in the pound; that he had not paid a bill since the 3d July; that he had perhaps dishonoured thirty or forty bills; that his debts perhaps amounted to 50,000*l.*; but that at the time when he deposited the plate with the defendant, he believed he could have paid his debts, and that he believed so at the time when the meetings of his creditors were held. A settlement had been made by the bankrupt's father, under which the defendant and a Mr. *Newman* had been appointed trustees. By this deed, amongst other property, the produce of a life policy, effected with the Equitable Insurance Office for 1000*l.*, had been settled for the benefit of Mrs. *Miles*, the bankrupt's sister, and her children. When the life insured dropped, the bankrupt obtained possession of the policy, and having received the money upon it, applied it to his own purposes. On the 3d August, 1831, a bill was filed in the Court of Chancery, by the husband of Mrs. *Miles*, against the defendant, Mr. *Newman*, and the bankrupt, for an investment of the amount upon the trusts of the settlement. The solicitors of the husband had, for some months before the bill was filed, threatened the defendant and his co-trustee with proceedings in equity. The bankrupt was absent from London from the 3d to the 23d of August. The bankrupt did not enter an appearance to the bill; and on the 10th of August, the solicitors of the plaintiff in Chancery wrote to the defendant, informing him that they had issued an attachment against the bankrupt for non-appearance. This letter was forwarded to the bankrupt on the following day, in a letter from the defendant's partner, recommending him to settle the matter, but without intimating that the attachment might be avoided by entering an appearance. On the morning of the 24th of August, the bankrupt made the deposit of the plate with the defendant, and sent with it a letter, of which the following is a copy:

" Bridge Street, 24th August, 1831.

" My dear Sir,—Anxious to hear you and Mr. *Newman*

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harmless, as to the claim of 1000*l.*, made by Mr. *Miles*, and to prevent you and him from being taken on the attachment so often threatened by Mr. *Miles's* solicitors, I hereby deposit with you a policy of assurance, in the Guardian, on the life of *Solomon Carter*, for 500*l.*, and my chest of plate, on condition you will invest the above amount.

"Dear Sir, yours very truly,

"*Thos. Shirley.*

"*Jonathan Brundrett, Esq.*"

The defendant, after obtaining the deposit of the plate, stopped the proceedings in Chancery, and invested the sum of 1000*l.* pursuant to the terms of the settlement, which investment, according to the statement of a witness called by the defendant, was made *before* the last meeting, which was sworn by one witness to be on the 24th. The bankrupt stated that he had been much pressed by the defendant to restore the money which he had improperly received, in order that the trustees might invest it pursuant to the settlement.

On the part of the plaintiffs it was urged, that this was a fraudulent transfer of the bankrupt's property, made in contemplation of bankruptcy, and void by 6 *Geo. 4, c. 16, s. 82*. On the part of the defendant it was contended that there was no sufficient evidence to shew that the bankrupt contemplated that at the time of making the deposit he was in insolvent circumstances, and that even if that had been so, there was such a pressure as made the transfer involuntary, and therefore not fraudulent. The learned Chief Justice, after summing up the evidence, left it to the jury to say, whether the bankrupt knew that he was insolvent when he made the deposit or not, and whether the deposit had been made in consequence of a fear of adverse proceedings, or merely upon a collusive arrangement between the bankrupt and the defendant. The learned judge also stated it as his opinion, that the defendant was not bound to inform the bankrupt that the attachment might be avoided by entering an appearance, and that if the defendant was *bonâ fide* seeking to compel the bankrupt to assist in relieving him

from his liabilities as trustee, he was entitled to a verdict. The jury found that there was a preference, and no adverse pressure, and returned a verdict for the plaintiff. Leave was given to move to enter a nonsuit, or for a new trial.

In Hilary term following, Sir James Scarlett obtained a rule for a new trial, on the ground that the verdict was against evidence; against which

F. Pollock and *Martin* now shewed cause. The Court will not send this case back for a new trial unless it appear most clearly that the jury were wrong in the conclusion at which they have arrived: *Cook v. Rogers* (a). Whether the bankrupt contemplated bankruptcy, is a question for the jury, who, in deciding it, might take all the circumstances of the case into their consideration: *Flook v. Jones* (b), *Poland v. Glyn* (c). The question whether the deposit was made with the purpose of a voluntary preference was also for the jury: *Carroll v. De Tastet* (d). It was also for the jury to say whether or not the pressure was colourable only: *Crosby v. Crouch* (e). If this verdict should be set aside, the Court will at once nearly dispose of the whole doctrine relating to fraudulent preferences. Under the circumstances of this case, it is impossible to suppose that the bankrupt did not, at the time of the transfer, contemplate a bankruptcy. It is true that the bankrupt intimated that he hoped to retrieve himself by obtaining a moneyed partner; but it would seem as reasonable to say, that he did not contemplate bankruptcy, because he intimated that he intended to buy a lottery ticket; which he hoped would produce sufficient to pay his debts. But, in order to render a transfer of goods to a particular creditor void, it is necessary not only that it should be done in contemplation of bankruptcy, but also that it should be voluntary; *Crosby v. Crouch* (e); and it

(a) 7 Bingham, 438.

(b) 4 Bingham, 20.

(c) 2 D. & R. 311, and in a

note to 4 Bingham, 22.

(d) *Montagu's Bankruptcy*

Cases, 158.

(e) 11 East, 200.

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is to be contended in this case that there was such a pressure by the defendant as made the transfer involuntary. There was, however, here no valid cause of terror, such as could warrant the preference. In *Thornton v. Hargreaves* (a), Lord *Ellenborough* decided that where by the execution of the creditor's threat the bankrupt could have been in no worse situation than he was placed in by making the transfer, such a transfer is to be considered voluntary, because the bankrupt did not redeem himself from any difficulty by doing the act, which is the motive for such an act when done under the pressure of a threat. [*Perke, J.* It is not necessary that the party should gain any benefit by the act. It has been decided, over and over again, that where no debt is actually due, yet there may be such pressure as will make the payment not a fraudulent preference. The question is simply whether it is a voluntary preference moving from the bankrupt in consideration of bankruptcy.] The party could have been under no apprehension. He could have entered an appearance upon payment of 6s. 8d., which would have put an end to the attachment. The letter which he wrote, and which accompanied the plate, clearly evinces that no terror was operating upon his mind, and that his motive was to secure the defendant from loss, and not to protect himself. If there be in the mind of the bankrupt a contemplation of insolvency and a desire to prefer one person, a transfer to that person is a fraudulent preference, notwithstanding pressure. In *Cook v. Rogers*, *Alderson, J.*, after referring to the dicta of Lord *Alvanley* and of Lord *Ellenborough* in several cases, says, "It seems to me, therefore, that the motives and intentions of the bankrupt may be material or immaterial, or, to speak accurately, may be more or less material, according to his situation, to the nature of the threat, and the degree and period of urgency by the creditor." The decision in *Bayley v. Ballard* (b) is at variance with this; but

(a) 7 East, 544.

(b) 1 Campb. 416.

in *Cook v. Rogers*, it was doubted by the Court whether that case was law.

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Sir *Jas. Scarlett* and *Butt*, contra. There was not in this case sufficient evidence of a contemplation of bankruptcy, and such circumstances of pressure were proved as warranted the transfer of the goods. If there be evidence of such a pressure as the law will acknowledge to be sufficient, it matters little what may be passing in the mind of the bankrupt. In *Crosby v. Crouch*, Lord *Ellenborough* very distinctly laid down the law upon this subject, and said, that "in considering whether the act in question were in this sense properly *voluntary*, it is material to see from which party the proposition of making the deposit originated, whether from the bankrupt or from the defendant." It is not necessary that there should be *terror* on the mind of the debtor. If an action is commenced, or a bill in equity filed against him, and he knows that if he does not pay immediately, he will be liable in the end to pay not only the original debt, but also heavy costs, this is quite sufficient pressure to deprive the transfer of the character of a fraudulent preference. All the authorities shew that the pressure here employed was sufficient to take the case out of the rules respecting voluntary preferences. In *Eden's Bankrupt Law* (a), it is said that a payment or delivery under the threat or apprehension (however unfounded) either of a criminal or civil process, is valid; as where a trader acts from the mere importunity of the creditor; *Thompson v. Freeman* (b), *Hurtshorn v. Slodden* (c). [*Denman, C. J.* The principle is well established. Those cases are only useful to shew the mode in which the principle was applied to the facts. *Parke, J.* The preference, to be fraudulent, must be with the intent to defeat the equal distribution which ought to be made under the commission of bankruptcy.] Here, there is sufficient evidence of pressure

(a) Page 31. (b) 1 T. R. 155. (c) 2 Bos. & Pul. 584.

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by the creditor, and therefore it cannot be taken that the transfer was made with the intent to defeat the object of the bankrupt laws. On another ground also this delivery was good, namely, that there was a new consideration, distinct from that arising from the old debt, which consideration was the stopping, by the defendant, of the Chancery suit, and the agreement to invest the money. In *Whitwell v. Thompson (a)*, Lord Kenyon said, that "all the cases, without a single exception, where the assignment of his property by a trader have been deemed fraudulent and an act of bankruptcy, have been where it has been given for a by-gone, and before-contracted debt; but that it never could be taken to be law that a trader could not sell his property when his affairs became embarrassed, or assign it to a person who would assist him in his difficulties, as a security for any advances such person might make to him." In *Hunt v. Mortimer (b)*, the same principle was adopted in this Court. The new consideration which operated here takes the case out of the ordinary rule as to fraudulent preferences. Upon these three grounds, therefore, it is submitted that in this case a new trial ought to be had.

DENMAN, C. J.—I think that there ought to be a new trial upon payment of costs. The questions of law may be afterwards more fairly discussed.

LITLEDALE, J.—Both the questions as to the voluntary preference and the contemplation of bankruptcy, and particularly the latter, should be more accurately submitted to the jury. It is not now necessary to define what amounts to a contemplation of bankruptcy. It seems to me that the cases upon questions of fraudulent preference in contemplation of bankruptcy have lately gone much further than they ought to have gone, and that the Courts have been by degrees narrowing the rule in favour of assignees more than I think correct.

(a) 1 Esp. N. P. C. 72.

(b) 5 Mann. & Ryl. 12; 10 B. & C. 46.

PARKE, J.—I also think that there should be a new trial, particularly upon the question of the contemplation of bankruptcy. The proper definition of a fraudulent preference, is a voluntary preference moving from the bankrupt in favour of a particular creditor and in contemplation of bankruptcy. The rule has been too much extended in favour of assignees, and juries have applied the rule to cases which appear to me not to be within it. I do not quarrel with the *decision* of the Court of Common Pleas in *Ridley v. Gyde* (a); but I foresee that if the *doctrine* there laid down be applied to other cases, it may be very injurious in its consequences. If pressure is to be disregarded in these cases, no person will be safe; and the effect will be that a delivery of goods to a particular creditor will in all cases constitute an act of bankruptcy.

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preference
defined.

PATTESON, J.—I am entirely of the same opinion. The modern decisions have gone too far. The cases have been creeping on one after the other; and I think that if not checked, the Courts would at last come to be content with evidence of general insolvency as proof that the party *must* have contemplated bankruptcy. If the initiative be with the debtor himself, then the preference will be fraudulent; but not if it be with the creditor. In such case I think there would be sufficient pressure; but at all events it cannot be necessary that there should be such a *terrifying* pressure as is spoken of.

Rule absolute.

REGULÆ GENERALES.

TRINITY TERM, 3 WILL. IV, 1833.

24th May, 1833.

IT IS DECLARED AND ORDERED, That in all cases in which a defendant shall have been or shall be detained in prison on any writ of *capias* or *detainer*, under the statute

(a) 9 Bingham 349; 2 Moore & Scott, 448.

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2 *Will. 4*, c. 39, or being arrested thereon shall go to prison for want of bail, and in all cases in which he shall have been, or shall be rendered to prison before declaration on any such process, the plaintiff in such process shall declare against such defendant before the end of the next term after such arrest or detainer, or render, and notice thereof, otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering an appearance according to the form set forth in the aforesaid statute 2 *Will. 4*, c. 39, Schedule No. 2; unless further time to declare shall have been given to such plaintiff by rule of court or order of a judge.

(Signed by the Fifteen Judges.)

IT IS ORDERED, That from the present day, in all actions against prisoners in the custody of the Marshal of the Marshalsea, or of the Warden of the Fleet, or of the Sheriff, the defendant shall plead to the declaration at the same time, in the same manner, and under the same rules as in actions against defendants who are not in custody.

(Signed by the Fifteen Judges.)

TRINITY VACATION.

17th June, 1833.

IT IS ORDERED, That from and after the Tenth day of July next, where the plaintiff proceeds by action of debt on the recognizance of bail in any of the Courts at Westminster, the bail shall be at liberty to render their principal at any time within the space of fourteen days next after the service of the process upon them, but not at any later period; and that upon such render being duly made, and notice thereof given, the proceedings shall be stayed upon payment of the costs of the writ and service thereof only.

(Signed by the Fifteen Judges.)

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

MICHAELMAS TERM,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.


The KING v. The Inhabitants of the Parish of
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UPON an appeal against an order of two justices, whereby *Elizabeth*, the wife of *Isaac Horle*, and her seven children, were removed from the parish of Banwell to the parish of Wick Saint Lawrence, both in the county of Somerset, the Court of Quarter Sessions confirmed the order, subject to the opinion of this Court upon the following case :

The paupers were in 1822 removed, by an order, from the respondent to the appellat parish, against which order there was an appeal to the Easter sessions in that year. The respondents having discovered, before those sessions, that the paupers were irremovable by reason of their residing on a tenement purchased by *Isaac Horle* for less than thirty pounds, determined to abandon their order of removal; which reason was communicated by the then attorney of the respondents to the then attorney of the

An order of sessions, confirming an order of removal, is conclusive as against all the world.

An order of sessions, quashing an order of removal, is final between the parties only upon the point which formed the actual ground of decision; and upon the trial of an appeal against a second order of removal of the same pauper, between the same parishes, parol evidence is admissible to shew the particular grounds of the former decision; and if it appear that the question of settlement was not on that occasion adjudicated upon, the first order is not final upon that point.

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appellants, but no mention of the same was made to the Court; and at the same sessions an order was made, by the consent of all parties, for quashing the said order of removal; in which order of sessions no mention is made of the grounds on which the same was quashed. The Court, thinking themselves bound to admit evidence of the facts above stated, overruled an objection to its admissibility, made by the counsel for the appellants; and upon proof that *Isaac Horle*, before the second order of removal, sold the tenement which had rendered him irremovable, and it being proved that he had, before 1822, obtained a legal settlement in the appellant parish, the Court confirmed the second order of removal.

The question for the consideration of this Court is, whether the Court of Quarter Sessions improperly admitted such evidence, and whether the order of sessions made in 1822, was, as between the present parties, conclusive of the paupers' settlement at that time.

Erle, in support of the order of sessions. Where, upon an appeal against an order of removal, the question is tried upon the merits, an order of sessions, quashing the order of removal, is conclusive between the parties, but it is otherwise where the order is quashed upon matter of form only. In *Rex v. St. Andrew, Holborn (a)*, an order of removal adjudged the settlement of the pauper to be in the parish of St. Andrew, Holborn, who was thereby directed to be removed from St. Andrew, Holborn, to Northaw. Upon appeal, it was ordered that the order should be quashed for want of a proper adjudication of the last legal settlement of the pauper, which was apparent on the face of it, and the order was quashed accordingly. Subsequently another order was made, by which the pauper was removed from St. Andrew, Holborn, to Northaw. The Court of Quarter Sessions quashed this order, upon appeal,

(a) 6 T. R. 613,

on the ground that the decision of the sessions in quashing the former order was conclusive and binding between the two parishes; but stated a case for the consideration of this Court. The opinion of Lord *Kenyon* was, that it was undoubted law that if an order of removal be quashed for form, it does not conclude the parties. This case shews that if the special ground of quashing be set out by the sessions, and it appears to have been quashed for matter of form, the order is not conclusive. In other cases the entry upon the minutes of the sessions has been merely that the order was quashed, and the parties have been allowed to go into *evidence* that the order was not quashed generally upon the merits, but upon matter of form: *Osgathorpe v. Diseworth* (a). [*Taunton, J.* These positions may be granted to you; but how does it appear that this order was quashed for defect of form?] It is stated to have been quashed because at the time of making the order of removal the party was not removable. [*Taunton, J.* That is not a defect of form.] It is a defect similar to that which appeared in *Osgathorpe v. Diseworth*. Here, the question of settlement was not adjudicated upon: the order was quashed, not because the pauper was not settled in the parish to which he was directed to be removed, but on the ground of a temporary circumstance, which rendered him at the time irremovable. Unless the question of settlement is adjudicated upon, the order of sessions is not final. In *Rex v. Wheelock* (b), there was in some respects an adjudication upon the merits, but not upon the question of *settlement*; and the Court sanctioned the proposition that if the place of settlement is not decided upon, the order is not necessarily conclusive between the parties, and that where the special ground does not appear upon the entry, the party may, on the trial of another appeal against another order for the removal of the same pauper, explain by evidence the particular ground upon which the former

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(a) 2 Stra. 1256; Burr. S. C. 251.

(b) 5 B. & C. 511.

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order was quashed. [*Taunton*, J. That would lead to great inconvenience. If it becomes necessary to go into parol evidence of all that took place upon the former appeal, that would lead to great trouble and expense.] There may be some trouble and expense attending the giving of parol evidence; but it has been laid down that in questions of settlement it is particularly expedient to abide by former decisions. Now, it is established that the justices are not bound to direct a special entry, and that where none has been made, the party may give evidence of the circumstances under which the order was quashed. This was expressly stated by *Bayley*, J. in *Rex v. Wheelock*. The cases are collected in *Phillips on Evidence* (a) *Osgathorpe v. Diseworth* and *Rex v. Denbighshire* (b) in effect decided this case. In the latter case, an appeal having been dismissed, on the ground that it was entered on the behalf of one overseer only, a second notice of appeal was given by two overseers. The magistrates heard the second appeal, and decided upon the merits in favour of the appellants; which decision this Court refused to disturb. [*Taunton*, J. In that instance, a new state of facts had intervened.] There has been a similar change of facts here; for though in 1822 *Isaac Horle's* settlement was in the appellant parish, yet he was not removable, because he was living in the respondent parish upon property of his own, which, though too small to give him a settlement there, rendered him then irremovable. It was upon this preliminary objection that the first order proceeded. Since that time he has sold this property, and thus a new state of facts has intervened, which gives to the justices a power of removing now, which in 1822 they did not possess.

The reason why a former judgment is in any case binding between the parties, and is conclusive evidence in a new action between the same parties, upon the same subject-matter, is, that the question has already been determined. It is always matter to be proved by parol evidence, whether

(a) 7th edition, vol. i. 330.

(b) 1 Barn. & Adol. 616.

the question raised in the second action was a question determined upon in the second. In the case of a reference to an arbitrator of all matters in difference, if an action be afterwards brought upon a matter within the terms of the submission, it is to be shewn by parol evidence, whether the matter for which the action is brought has really been inquired into by the arbitrator and determined by the award. The decisions of the Court of Quarter Sessions, by quashing in 1822, and by confirming in 1833, are not inconsistent with each other.

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Moody, on the same side, was stopped by the Court.

Campbell, S. G., and *F. N. Rogers*, *contra*. An order of sessions quashing an order of removal, which is good upon the face of it, and which does not give any special ground for the quashing, is conclusive between the parties that the settlement has been adjudicated upon. And even if a party might generally shew on what ground the sessions proceeded, he could not do so here.

The first of these propositions is by far the more important to be considered, because it affects the general practice. The common understanding is, that if an order of sessions quashes an order of removal, generally it is conclusive between the two parishes; if it confirms it, the order is conclusive against all the world. It is by no means uncommon at sessions to have disputes as to whether the Court should make a special entry of the grounds for quashing, and the argument has always on those occasions been, that if such entry were not made, the order would be conclusive between the parties. If there be a rule established in practice, the Court will act upon it. There would be no inconvenience here in acting upon this rule. [*Denman*, C. J. There would be the greatest inconvenience here. It would be the grossest injustice to act upon such a rule between these parties, who well know that the question of settlement has not been decided upon.] If the removing parish, after the

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order of removal made and before appeal, discover that the pauper, though not settled in their parish, but is at the time irremovable, there is a plain straight-forward course to be pursued, namely, to obtain a supersedeas. Against the argument of inconvenience it may also be urged, that the Court of Quarter Sessions has always the power of making a special entry, and this Court will presume that such power is exercised properly. On the other hand, will the Court admit such parol evidence to be given on one side, and for the other side to shew that the order did not adjudicate upon settlement? The removing parish in this case was to blame. They might have obtained a supersedeas, which they neglected to do; and they might have applied for a special entry, which they either did or did not do. If they did not, it was their own fault; if they did, and the Court refused to make such entry, then the application to this Court should have been of a different nature. But the Courts have always been anxious to lay down a rule applicable to general convenience, and not to the particular circumstances of the case. None of the authorities quoted support the proposition contended for. *Rex v. St. Andrew* merely proves that if the special ground be stated, the order is not conclusive. In *Osgathorpe v. Diseworth* there is this difference, that at the time of the first order, the pauper, who was a certificated man, was not chargeable, and the second order was after he became chargeable. The words in *Rex v. Wheelock*, which are relied on, are merely an obiter dictum unnecessary to the decision of the case. The question there was merely whether this Court could interfere with the adjudication, or mode of entering judgment, which the judges of an inferior court thought proper to adopt. In *Rex v. Denbighshire* there had been no adjudication at all. The order had not been quashed, but the sessions dismissed the appeal, and the application to this Court was for a certiorari. That decision can therefore be no authority in a case where there has been an adjudication. *Munger-hunger v. Warden* (a)

(a) 2 Bott's P. L. 702; and cited 6 T. R. 614.

is an authority, and on the other side: The case is thus stated in 2. Bott, 708:—"Two justices removed a pauper from the parish of Warden to the parish of Munger-hunger, in the county of Bedford. The parish of Munger-hunger, appealed, and the order was reversed for a defect of form, but which was a good order. Afterwards they sent the pauper back. Yet the order being good, it is final, and a bar to all subsequent orders." [Denman, C. J. They may have chosen to abide by the opinion of the Court upon that one point.]

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There was no sufficient evidence before the Court that the first order was not quashed upon the merits. All that is here shewn is, a correspondence between the attorneys of the respondents and of the appellants, and that without the objection that the paupers were irremovable being mentioned to the Court, an order for quashing the order of removal was made at the sessions by consent of all parties. The appellants ought to shew, by direct evidence, that the Court in quashing the order did not adjudicate upon the merits. That which is stated in the special case, of the communication between the two attorneys, shews nothing more than that there certainly was one ground upon which the parties submitted to have it quashed. It does not appear how many other grounds they may have had for consenting to the order. This may be assimilated to the case of a judgment by default. Second point.

DENMAN, C. J.—The ground of the former order of sessions appears to have been the irremovability of the pauper. The question as to the admissibility of the evidence, depends upon whether explanation may be given by parol of the grounds upon which a particular order of removal is quashed. And this again depends upon the nature of the particular case. All orders of removal, which upon appeal are confirmed, are final between all parties, and orders quashed are final between the parties to the orders; but final, I take it, only upon the question which the Court

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upon the appeal has decided; as here, the order is conclusive, to shew that the pauper was at the time of the order made irremovable. There are many other grounds besides that of a pauper's not being settled in the appellant parish, upon which an order of removal may be quashed; as, for instance, it may be, that the party removed was not chargeable; and I think it a matter open for inquiry, whether the Court acted upon one ground or upon another. I see no inconvenience in entering into this inquiry, which is not upon the law or upon the merits, but simply whether in point of fact the Court of Quarter Sessions had decided upon the merits. If no proceedings are taken to revise the opinion of the sessions, that opinion is clearly final upon the question decided by them; but still the inquiry may be entered into as to which of the several grounds upon which the Court might have decided, they did in fact give their opinion. This is sought to be limited, by saying that where the order is general, it must be presumed that the merits have been adjudicated upon. But I do not find that in *Osgathorpe v. Diseworth* there was any special entry; and yet it must be taken that in that case the Court decided that the first order was not final, because there was in fact no decision upon the merits; therefore that is an authority for the course which we are now pursuing. So is *Rex v. St. Andrew, Holborn*. In *Rex v. Wheelock*, it seems to me that *Bayley, J.* and *Holroyd, J.* came to a similar decision. That was an application to the Court to compel the justices to make a special entry on the proceedings of their last sessions, that an order of removal had been quashed for want of proof of chargeability. The affidavit stated that the justices being of opinion that there was no sufficient proof of chargeability, refused to go into the merits, but quashed the order *generally*, and although much pressed, would not make an entry of the particular ground. This Court refused the application, upon the ground that the order was not final, and that upon the trial of an appeal against a second order of removal, the same party might

explain by evidence the particular grounds upon which the first order was quashed. So that we have the refusal of this Court to order the sessions to make an entry, on the ground that the party has his remedy in the way which we now declare to be according to law. It is an express authority in favour of what we have now done. Upon the argument that there is no inconvenience, I say that injustice is the greatest inconvenience; and if where an order general upon the face of it is quashed, but not upon the merits, it could be set up by a party, who knew that there had been no adjudication upon the merits, as final and conclusive, there would be great injustice.

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PARKE, J.—I am quite of the same opinion. (His lordship then briefly recapitulated the facts of the case and proceeded.) The only question for us is, whether the sessions were right in admitting this evidence. As to whether they were right in the conclusion which they drew, we need not inquire. I have, however, no doubt in my own mind but that they were right, and that the evidence established the point that the question of settlement had not been adjudicated upon. The only question is upon the admissibility of this evidence, and I think it would lead to much injustice if we were to decide that it was not admissible. Two rules have been laid down. To the first, which is, that an order of removal *confirmed* is good against all the world, I see no objection. The second is, that such an order *quashed* is final between the parishes, parties to the order. Upon looking at this, I can only say that the order made in this case is final, for the purpose of shewing that the appellant parish was not bound to receive the pauper upon that particular order of removal. This is like an acquittal upon a road indictment(a). By analogy it might be said, that this is not even evidence on the question of settlement. The decision may only have been here that the party was not chargeable, but only liable to become chargeable, or it

(a) And see Mann. N. P. Dig. 215, Nuisance. pl. 31, n.

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may have been, as here, that the pauper was irremovable. Therefore, reasoning from analogy, I should have said that the better rule would have been, to have held that the order quashed was not admissible evidence to prove any thing. In *Osgathorpe v. Diseworth*, it is not stated that the ground of the former decision appeared *upon the face of the first order*. It was there contended that an order quashed is final between the parties; but the Court said, so it would be if the special matter did not appear. This I think a clear authority for our present course. Then comes the case of *Rex v. Wheelock*, which seems to me to be a direct authority on the same point. Undoubtedly the party must have had a right either to require the special ground to be entered, or to have some other remedy. And the Court held that the party was not entitled to a mandamus to compel the sessions to make the entry, stating as their reason, that the respondents were not concluded by the judgment of the session, but might, on the trial of another appeal against another order of removal, between the same parties, explain by evidence the particular ground on which the former order had been quashed. As to the case of *Munger-hungerv. Warden*, I doubt whether that is any authority at all. In that case it merely appeared that by the first order there had been no adjudication of the question of settlement. The decision of a court is never final, except upon the point upon which they have adjudicated.

TAUNTON, J.—I certainly entertained a strong impression, in the first instance, that the course pursued was not right. I however pressed my difficulties upon Mr. *Erle*, in order that he might give me, as he did, a satisfactory answer, both from the cases and the tenor of his argument. I do not by any means wish to impugn the rule laid down by the solicitor-general and Mr. *Rogers*, that an order *confirmed* is conclusive as against all the world, because I think it a most wholesome rule, which greatly diminishes expense. But when an order of removal is *quashed*, I think the order

quashing it must operate with reference to the state of things which existed at the time, and that it is not conclusive as to any other point than that upon which the decision in fact proceeded. It appears to me, therefore, that the evidence was rightly received, to explain the extent to which the order should operate. It has been argued by Mr. Erle, and this is the gist of his argument, that if the evidence be admissible, the ground of quashing in 1822 was altogether a temporary ground; that the order was not quashed because the pauper had no settlement in the appellant parish, but because he was residing in the respondent parish, in a tenement which was his own property, and that therefore as soon as this temporary ground was removed, the order of sessions ceased to be in force. This argument proceeds on the ground that the order of 1822 was premature, because the pauper was at that moment irremovable. It appears that after the quashing of the order of 1822, a new state of things was constituted. The pauper sold his tenement, and thus became no longer irremovable. If so, the right to remove being only suspended, when that suspension was removed, a new state of things, under which the right to remove revived, was introduced. I rely almost wholly on the case of *Osguthorpe v. Diseworth*. I do not place so much reliance on *Rex v. Wheelock*, not because I do not feel it entitled to respect, but because the point did not come directly before the Court, and therefore it is that I do not think it entitled to so much weight as would be due to a case in which the express point which was before the Court was decided upon. I cannot distinguish this case from that of *Osguthorpe v. Diseworth*. There was an order of removal of a certificated person not then chargeable, and it was said that a certificated person could not be removed upon the prospect of his becoming chargeable, but that he must be actually chargeable. Afterwards, and after he became chargeable, and therefore removable as a certificate man, a second order was made. The evidence received must have been of circumstances

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dehors the order. The Court of Quarter Sessions decided that the first determination was not final, and that therefore the second was proper. It was moved to quash the order, on the ground that a removal of the first order was final. Sed per Curiam, "So it would be if the special matter did not appear; a certificated person cannot be sent back until he is actually a charge; a removal before is *premature*." So I say in this case, that as long as the man resided in one parish upon his own property, which rendered him irremovable, he must be suffered to remain in that parish; and until that property ceased to be his own, a removal, if made, was premature. This case was not decided upon the merits by the first order, and therefore I think that the sessions were right in holding that order not to be final.

PATTESON, J.—I am of the same opinion. Upon this case we must take it that the sessions were satisfied that upon the first order the merits had not been gone into. If they had not been really and substantially satisfied of that fact, they would not have sent this case. It seems to be admitted, that if the special ground had appeared upon the face of the order, it would not have been final. Then the question is, whether the sessions were right in receiving parol evidence of the circumstances. I cannot distinguish this case from *Osgathorpe v. Diseworth*, although I cannot help thinking that it would be better that the reasons should appear upon the order, because the necessity of producing parol evidence upon the trial of the second appeal is attended with great expense. I would decide upon the authority of that case, which, though it does not state that parol evidence *must* be received, I consider as a direct authority. That case is confirmed by *Rex v. Wheelock*; for although that is not a direct authority, I cannot see what ground there can have been for refusing the mandamus, except that upon an appeal against another order, parol evidence of the circumstances might be received. Surely the Court of Quarter Sessions would other-

wise have been bound to put their reasons upon their proceedings; and therefore the Court would not have refused to compel them to do so, unless the parties had had some other remedy, which other remedy must necessarily be the giving parol evidence of the reasons. Both cases are, I think, in point, and I agree with the rest of the Court.

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Order of Sessions confirmed.

MITCHELL v. JENKINS, Clerk.

CASE for a malicious arrest, tried before *Taunton, J.* at the Devon summer assizes, 1832, when the following facts were given in evidence. The plaintiff became, at Lady-day, 1831, indebted to the defendant, as vicar of Sidmouth, in the sum of 45*l.*, for one year's composition for tithe. On the 15th April and 13th May, *Jenkins's* attorney applied by letter to *Mitchell* for the payment of tithe, and offered in such letter to allow him a set-off, if produced and found to be correct. No notice being taken of these letters, *Jenkins* made an affidavit of debt for 45*l.*, and caused *Mitchell* to be arrested for that amount. The sheriff's officer to whom the warrant was given, and who subsequently arrested *Mitchell*, received instructions from *Mitchell's* attorney to allow the sum of 16*l.* 5*s.* in case the plaintiff would settle the debt. The plaintiff, after being a day in custody, gave a bail-bond. *Jenkins* continued the proceedings against *Mitchell* until he discovered that by having arrested for more than the balance actually due, he had exposed himself to the payment of costs under 43 Geo. 3, c. 46, s. 3, upon which the town agents of his attorney wrote to the town agents of *Mitchell's* attorney, stating that if *Mitchell*, upon being allowed the amount which he claimed as a set-off, and his costs up to that time, would immediately pay the balance, they were authorized

In an action for a malicious arrest, the jury may imply malice from the absence of reasonable or probable cause. But this is an inference not of law but of fact, which the jury are not bound to draw. Presenting to the jury the absence of such cause as conclusive evidence of legal malice, is a misdirection.

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a good cause of action. *Bayley*, J. says, "I accede to the proposition, that if a party lays all the facts of his case fairly before counsel, and acts bonâ fide upon the opinion given by that counsel, (however erroneous that opinion may be,) he is not liable to an action of this description." *Holroyd*, J. guards himself still more. Suppose, however, that the question had been left to the jury, and they had found for the defendant, such a verdict could not have stood unless the Court would decide that mere ignorance of law is a sufficient excuse (a). In this case, *Jenkins*, if ignorant of the law, should have secured himself by taking the opinion of counsel, as was done in *Ravenga v. M'Intosh*. In *Bromage v. Prosser*, *Bayley*, J. says (b), "In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely*, it is not necessary to state that they were spoken *maliciously*." In no action for indicting or arresting without reasonable and probable cause, has the defendant obtained a verdict on the ground of there being no *malice in fact* proved. In *Parrott v. Fishwick* (c), which was an action for a malicious prosecution for perjury, where the bill of indictment was found and the plaintiff was acquitted, Lord *Mansfield*, in summing up, said, "That it was not necessary to prove *express* malice, for if it appeared that there was *no probable cause*, that was sufficient to prove an *implied* malice, *which was all that was necessary to be proved to support this action*." [*Parke*, J. To be implied by whom?] By the jury. [*Parke*, J. Yes.] But the question is, whether the judge is not bound to tell the jury to imply it. [*Denman*, C. J. That would not be an implying by the jury.] In *Gibson v. Chaters* (d), where the arrest had been made in ignorance of the fact that the debt had been paid to an agent, and no actual malice had been proved, it was

(a) *Vide* M. 20 H. 7, fo. 2, pl. 4, dict. per *Fineux*; *Manser's* case, 2 Co. Rep. 3; *Williams v. Bartholomew*, 1 Bos. & Pull. 326; *Bilbie v. Lumley*, 2 East, 471; *Stevens v. Lynch*, 12 East, 38; *Doctor and Student*, Dial. 2, capp. 46, 47;

Dig. lib. 22, tit. 6; *Pothier*, *Traité de l'action Condictio indebiti*, part. 2, sect. 2, art. 3. Mann. N. P. Digest, 2d ed. 89, pl. 341, n.

(b) 4 Barn. & Crossw. 255.

(c) 9 East, 362, n.

(d) 2 Bos. & Pull. 129.

held that the facts of the case precluded the inference of malice.' So here, to have shewn that *Jenkins* was ignorant of the facts when he made the arrest, would have precluded the inference of malice, which the law now raises, and he would have been entitled to a verdict. The words of Lord *Mansfield*, in *Parrott v. Fishwick*, entirely agree with the language employed in this case by Mr. Justice *Taunton*. [*Parke, J.* The rule which you are laying down is expressly in opposition to the opinions of Lord *Mansfield* and Lord *Loughborough*, in *Johnstone v. Sutton* (a). It is not contended, as a general proposition, that this is not a question for the jury; still, unless the Court is prepared to say that there is no case in which the law will imply malice, the judge will be obliged to direct the jury, that if they believe the facts they must imply malice. In the case of murder, where particular facts are proved, the judge may tell the jury that the law implies malice from those facts. In Case for a malicious prosecution, if there be no reasonable or probable cause, the Court will tell the jury to imply malice. [*Denman, C. J.* That might depend upon the particular facts of the case. We might or might not imply malice. Suppose a party had a deposition which he believed to be evidence, but which was not so, and he went before the grand jury, and upon which they in similar ignorance found an indictment, there would be no reasonable or probable cause, yet we should not imply malice.] If the law will presume malice, the direction of the learned judge was right. [*Parke, J.* It does not follow that a fact is not to be left to the jury, because they can only find one way. There are several cases upon the statute of 43 *Geo. 3*, with respect to costs, in which it has been held, that proof of the absence of reasonable or probable cause, without otherwise shewing malice, was sufficient to entitle a party to his costs, for a malicious and vexatious arrest, under the act; *Donlan v. Brett* (b). In two of these cases the arrest was for one

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(a) 1 T. R. 545.

(b) 5 Mann. & Ryl. 29; 10 B. & C. 117.

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side of an account, instead of the balance; *Sherwood v. Taylor* (a), and *Forster v. Weston* (b); and the Court held that the plaintiff was liable to pay costs under 43 Geo. 3, and moreover said, that the rule upon questions of that nature is the same as in actions for a malicious arrest. In *Austin v. Debnam* (c) it was held, in an action for a malicious arrest, that an arrest made upon one side of a mutual account, is malicious.

Coleridge, Serjt., and *Bere*, contra. It is true that *Austin v. Debnam* was an action for a malicious arrest, but it was expressly put upon the authority of *Dronefield v. Archer* (d), which was decided upon 43 Geo. 3. For some time it was considered in the profession that the questions in the two cases were identical, but the distinction is laid down in *Donlan v. Brett*, in which *Bayley*, J. said, "The question in this case is, not whether an action for a malicious arrest is maintainable, but whether the plaintiff had any reasonable or probable cause for procuring the defendant to be arrested and held to special bail for 575*l.*;" and his lordship and the rest of the Court decided, that in cases under the statute it was not necessary to prove malice, because the statute gave the costs where the plaintiff had not any reasonable or probable cause, without requiring that the arrest should be malicious. Since that time it has not been disputed that malice is essential to the nature of this action; nor is it to-day disputed, as a general proposition, that it is a question for the jury whether malice has been shewn. It is not less the province of the jury to find, because their course is easy and simple, than where it is more complicated. It is urged that no instance can be found in which under such circumstances there has been a verdict for the defendants. That may be so, but there are cases as strong as this where the plaintiff has been nonsuited for want of proof of malice,

(a) 6 Bingh. 280.

Barn. & Cressw. 139.

(b) Ibid. 527.

(d) 5 Barn. & Alders. 513; 1

(c) 4 Dowl. & Ryl. 653; 3 Dowl. & Ryl. 67.

In *Allen v. Snow*, where the defendant, acting under what he conceived to be sound advice, made a mistake in law, Lord *Ellenborough* said, "but he was acting under what he thought was good advice; it was unfortunate that the attorney was misled by *Higgins's* case; but unless you can shew that the defendant was actuated by some purposed malice, the plaintiff cannot recover." It may be, that in this case *Jenkins's* attorney acted upon a mistaken notion that *Brown v. Pigeon (a)* was still law. In that case it was held by Lord *Ellenborough* at nisi prius, that where cross demands are separate and distinct, and *A.*, to whom the larger sum is due, arrests *B.* for the balance only, no action lies against *B.* for arresting *A.* for the smaller sum due to himself. A few years ago that would have been an actual authority for the course he was advising his client to pursue, and yet a clergyman in the country, probably finding it in the books and acting upon it now, is to be liable, as it is said, to an action for a malicious prosecution. There are many cases in which ignorance of law or of fact has been held to excuse a party. So here, the question is not so much whether *Tomkins* had a right to arrest for the whole, but whether he *thought* that he had such right. The case of *Ravenga v. M'Intosh* is very strong upon this point. The chief justice directed the jury to find for the defendant if they were of opinion that, at the time when the arrest was made, *M'Intosh* acted truly and sincerely upon the faith of the opinion given him by his professional adviser, actually believing that *Ravenga* might be lawfully arrested; but for *Ravenga*, if they were of opinion that *M'Intosh* actually believed that he should fail in the action, and that he intended to use the opinion as a protection in case the proceedings were afterwards called in question. The opinion of this Court was most clearly expressed, that the direction of the chief justice was correct, and that a party who acted

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(a) 2 Campb. 594; and see Dr. cited 4 Burr. 1996; *Ashton v. Turlington's* case, 1 Kenyon, 424; *Naull*, 3 Moore & Scott, 184.

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bonâ fide upon the opinion of a legal adviser was not liable to an action for a malicious arrest; and it is said that the question in that case was, whether the party had acted bonâ fide under the advice of his pleader. In *Donlan v. Brett*, the cases in the Common Pleas were commented on. In neither of those cases could the party have brought an action for malicious arrest on the ground simply of the want of reasonable or probable cause. It may be very fair that a party who does not take care to inform himself of the law, or to become thoroughly acquainted with the circumstances before he acts, should be liable to pay costs as a penalty for his negligence; and it is not necessary to contend that the arrest was not in some degree a wrongful act, or that *Mitchell* would not have been entitled to recover his costs, on the ground that there was no reasonable or probable cause for an arrest to the extent of 45*l.*, but in an action for a malicious arrest malice in fact ought always to be proved. The learned judge, by his direction to the jury, withdrew the case from their consideration.

DENMAN, C. J.—Every arrest for more than is due, is in some sense a wrongful act. If it be made without reasonable or probable cause, by the late statute the party arresting may be liable for the costs. But beyond that the defendant in the former action may, if he thinks proper, bring an action for malicious arrest. It is quite clear, however, that in such an action he is bound to prove malice as an independent fact. It may be left to the jury to presume malice from want of reasonable and probable cause. If there be want of reasonable or probable cause, and no malice is found, the defendant is entitled to a verdict. Whether there is malice or not, is a question of fact, to be decided by the only proper jurisdiction for fact: whether or not there is reasonable or probable cause, is a question for the judge. I do not say what my opinion would have been in this case if I had been on the jury; there was some evidence, and a nonsuit was not applied for. If the defend-

ant has been deprived of the benefit which he might have gained from the decision to which the jury might *probably* have arrived, then, without speculating upon what their finding might have been, the defendant is clearly entitled to have a new trial.

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PARKE, J.—I am entirely of my lord's opinion. There should be a new trial; for the question of malice was a question *which should have been* submitted to the jury, and the judge did withdraw it from their consideration. I always thought that since the case of *Johnson v. Sutton*, which was decided long before I came into the profession, that the plaintiff must unquestionably prove, as alleged in the declaration, malice in fact; and that ought always to be left to the jury. Where there is no reasonable or probable cause, the jury may from this circumstance infer malice; but still it is a question for them. In this case, however, it has been withdrawn from them. By malice, you do not intend spite or hatred as in the common acceptance of the terms, but *malus animus*, an acting from some improper motive. If the party acted from a wrong notion of the law, I do not think that he is liable in this form of action.

PATTESON, J.—The whole argument for the defendant may be summed up in his short statement, that the jury may infer malice from the want of reasonable or probable cause, but are not bound to do so. Here, it was withdrawn from their consideration altogether: it was not said that they *might*, but that they *must* infer it. In every case this question ought to be submitted to the jury. It is laid down in all the cases that there must be a concurrence of want of reasonable or probable cause and malice.

TAUNTON, J.—I have no doubt upon the point now. I acted at the trial upon my impression of the case of *Bromage v. Prosser*. That was a case in which the Court decided against me, and which, perhaps, from that circum-

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stance, I remember well. . . That was an action of slander, in which I obtained a verdict for the defendant. . . The Court made a rule for a new trial absolute, and said, that there were two kinds of malice, malice in fact, and malice in law; the former meaning malice in its popular sense, and the latter such as the law will imply when there is a wrongful act intentionally done without just cause or excuse; and that in a case where the law implies such malice as is necessary to maintain the action, it is the duty of the judge to withdraw the question of malice from the consideration of the jury. So here, it struck me at the time that the present defendant having sued out a bailable process for 45*l.* when he knew that the plaintiff was entitled to deduct 16*l.* 5*s.*, had been guilty of an act per se wrongful, as in the case of *Bromage v. Prosser*. I am not pertinacious in holding to any opinion of mine. I now think that the question, as a matter of fact, should have been left to the jury. What I have said is rather in explanation of what I did at the trial, and not from a wish to express an opinion different from that of my brothers. I do not wish to dissent.

Rule absolute.

RIPON Gent. one &c., v. DAVIES.

An attorney is bound to give evidence of a statement made by himself to the adverse party by the direction of his client.

ASSUMPSIT for work and labour done as an attorney. At the trial at the London sittings after Trinity term, before *Denman, C. J.*, a verdict was found for the plaintiff, damages 10*l.* 3*s.*

Heaton now moved for a new trial; on the ground that evidence had been improperly received. In order to shew the work done, the plaintiff called a person who had been the attorney of the defendant to prove certain admissions made by the defendant, and by the witness as his attorney,

in the course of a conversation had between them and the plaintiff subsequently to the commencement of the action. This evidence ought not to have been received, inasmuch as it was of matters which had come to the knowledge of the witness whilst acting in a confidential capacity. *Gainsford v. Grammar* (a) is a case in all respects precisely similar to the present. [Denman, C. J. Did you take this objection at the trial?] An objection was taken to the witness being called. [Denman, C. J. That was not the proper objection, for this party was a perfectly good witness. There is no objection whatever to his admissibility. Your objection should have been to his giving evidence of the particular communication.]

DENMAN, C. J.—I cannot conceive that this objection was made at the trial, for if it had been so, I certainly should have had a note of it. The objection to the *admissibility* of the witness could not be valid. But, supposing the other objection to have been made, it does not appear to me that this falls within the nature of a privileged communication.

PARKE, J.—There is no pretence for saying that this was a communication which falls within the rule respecting privileged communications. This was an open communication made by one party to a suit to the other, and not a private communication made by the client to his attorney. In the case of *Gainsford v. Grammar*, Lord Ellenborough refused to receive evidence of what the client had directed his attorney to do.

TAUNTON, J. concurred.

PATTESON, J.—I certainly do not understand the case of *Gainsford v. Grammar* as reported; because it seems that

(a) 2 Campb. 9.

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there the witness was not allowed to give evidence of what he himself had stated to the plaintiff, which I cannot conceive to be law. I cannot help thinking that there must be some error in the report.

Rule refused.

The KING v. BLAKE, Esq.

A party taken under an irregular writ is privileged from arrest in returning from the chambers of the judge who has discharged him.

So, although his attendance before the judge be voluntary; as where he is brought up under a habeas corpus obtained by himself.

It is competent to the Court of Chancery to issue several concurrent writs de contumace capiendo.

A contumace capiendo may be returnable on or after the essoign day of the term.

A Writ de contumace capiendo (a) issuing out of the Court of Chancery directed to the sheriff of Middlesex against *Blake*, on the prosecution of *Hugh Smith*, clerk, tested 18th January, 1832, returnable 16th April, was delivered of record (b) to the sheriff. On the 19th of January *Blake* was arrested on another contumace capiendo, issued at the instance of the said prosecutor, tested the 11th and returnable on the 23d of January, 1832; he was brought up by habeas corpus by the sheriff of Surrey, in whose custody he was, before *Patteson*, J. who discharged *Blake*, on the ground of irregularity. A few minutes after his discharge, and before he had had time to return to his residence, *Blake* was again arrested on a third contumace capiendo issued into Middlesex, tested 30th April, and returnable 23d May, for the same matter as the two preceding writs. Another application was made to *Patteson*, J. to discharge the defendant, but he refused to decide the question finally, permitting the defendant, however, to go at large until the ensuing term upon entering into a recognizance. In Trinity term last *Follett* obtained a rule to shew cause why the third writ de contumace capiendo should not be quashed, and the defendant discharged out of the custody of the sheriff and from the recognizance entered into by him.

Sir J. Scarlett and Hoggins now shewed cause. This

(a) As to the preliminary steps, Adol. 139.
vide *Rex v. Blake*, 2 Barn. &

(b) Vide post, 314, 315.

rule was obtained upon three grounds: First, that the defendant, at the time he was taken under the third writ, was protected from arrest: Secondly, that under 5 *Eliz.* c. 23, & 53 *Geo.* 3, c. 127, only one writ de contumace capiendo can issue out of Chancery: Thirdly, that the third writ was not returnable in term.

It has always been understood that a defendant is protected from arrest only when his attendance before the Court is involuntary, as when a witness is subpoenaed. It has never been held that where a party of his own accord attends a Court of Justice he shall be privileged from arrest. In the present case the habeas corpus was obtained by the defendant himself, and consequently his attendance must be regarded as altogether voluntary. *Rex v. Delaval* (a) is a case differing from the present, as there an illegal restraint was imposed upon the party, and the Court had to determine what person should have the custody of a minor.

We have affidavits made by the cursitors, stating, that it is the common practice to issue more than one writ de contumace capiendo out of Chancery in the same matter at the same time; and this, no doubt, is the proper course; for where one of the writs is not acted upon it is immaterial, and is the same as if it had not issued at all. *Ex parte Little* (b) may be quoted on the other side; but the true meaning of Lord Hardwicke's words in that case is, that if this Court is once seised of the cause, the Court of Chancery cannot interfere. The Court has no jurisdiction to issue a capias until the sheriff has returned non est inventus or cepi corpus, which had not been done in the present case. *The Queen v. Ball* (c).

This writ was returnable on the 23d of May, and, by 11 *Geo.* 4, and 1 *Will.* 4, c. 70, the 22d of May is the essoign day of Trinity term. The essoign day is to be considered as the first day of term. *Bolton v. Eyles* (d), *Bell v.*

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First point:
Whether defendant privileged from arrest.

Second point:
Whether more than one contumace capiendo can issue.

Third point:
Writ returnable out of term.

(a) 2 W. Bla. 410, 439, and 3 Burr. 1434.

(b) 2 Atk. 480.

(c) 6 Mod. 79.

(d) 2 Bred. & Bingham. 51; 4 B. Moore, 425.

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Broadbent et ux. (a), Struttford v. Cooper (b). Trinity term, in 1832, commenced on the 26th of May. By 1 Will. 4, c. 3, s. 2, the writ may be returnable three days before the commencement of the term.

First point:
 Privilege
 from arrest.

Follett in support of the rule. The defendant was privileged from arrest. It has been contended that such persons only as involuntarily attend Courts of Justice are protected from arrest. This is not so. The rule is, that all parties who have any relation to a cause which calls for their attendance in Court, or before a judge, and who attend bonâ fide though not compellable so to do, are protected from arrest. This is virtually a civil proceeding. The cases on this subject are collected in *Tidd's Practice (c)*. In *Wills v. Gurney (d)*, the plaintiff's attorney contrived that the defendant should be charged with, and be arrested for an assault on a Sunday, in order that on the following day he might be arrested on civil process. The Court ordered him to be discharged out of custody.

A fourth point:
 Second imprisonment
 after the habeas
 corpus.

There is another ground for quashing the writ. By the habeas corpus act, 31 Car. 2, c. 2, s. 6, it is enacted, that no person who has been set at large upon any habeas corpus, shall be again imprisoned for the same offence: and the same rule applies to civil proceedings; *Blackburn v. Stupart (e)*. Yet the party in this case was arrested for the same offence after he had been discharged by habeas corpus.

Second point:
 Whether more
 than one contumace
 capi-
 endo can issue.

By 53 Geo. 3, c. 127 (*f*), the judge of the Ecclesiastical Court is authorized to send a significavit to the Court of Chancery, whereupon a contumace capiendo issues. That writ is to be returnable in the same manner as the writ de excommunicato capiendo was formerly under the 5 Eliz. c. 23. By the latter statute the excommunicato capiendo was to be brought into this Court, and opened and delivered of

(a) 3 T. R. 123.

(b) Cro. Car. 103.

(c) 1 Tidd, 9th ed. 197.

(d) 8 Barn. & Cress. 769.

(e) 2 East, 243.

(f) Sect. 1.

record to the sheriff. From this it appears, that as soon as the Court of Chancery has issued the writ, it ceases to have jurisdiction, and cannot issue a second writ. *Rex v. Blake (a)*, *Rex v. Theed (b)*, *Rex v. Dugger (c)*, *Rex v. Fowler (d)*. [Parke, J. The statute gives jurisdiction expressly when the sheriff returns to the writ 'non est inventus.'] The Court has jurisdiction previously; for the Court can oblige the sheriff to return the writ. All ulterior process must consequently issue from this Court. As to the practice in the cursitor's office, the affidavit only states that it has been the practice to issue several writs at the same time during the last twenty years, and they speak only of the practice with respect to the contumace capiendo, and not of the old writ de excom. cap. [By the Court. The practice should be the same with respect to both writs.] It should be so, but it may have been otherwise. Assuming that this is the practice, it cannot control the words and purview of the act of parliament. [Denman, C. J. In *Rex v. Eyre (e)*, the decision was, that when the first writ is quashed application must be made to the Court of Chancery for another.] In that case the proceedings were not the same as here. [Parke, J. There is no doubt on this point, it has always been the practice to issue several writs.]

The 23d of May is not in term. The 1 Will. 4, c. 3, s. 2, has no reference to original writs of this description, it relates only to mesne process; the statute speaks of an *appearance* to the writs, and applies only to such writs as require an appearance.

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Third point:
Writ return-
able out of
term.

Cur. adv. vult.

DENMAN, C. J. now delivered the judgment of the Court.—In this case all the questions were disposed of but one, and that was, whether the defendant was privileged

Judgment on
first point.

(a) 2 Barn. & Adol. 139.

(b) 1 Str. 43.

(c) 1 Dowl. & Ryl. 460.

(d) 1 Salk. 293.

(e) 2 Stra. 1189.

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from being taken under a writ de contumace capiendo. He had been in custody under a former writ of the like nature, and had sued out a writ of habeas corpus, and the learned judge before whom it was returnable, being of opinion that the process was void for want of a proper interval of time between the teste and return, discharged the defendant. Whereupon the prosecutor having sued out another writ, apprehended the defendant under it on his way home from the judge's chambers. And upon consideration, we think he was privileged from arrest on this occasion. There is no case to be found in which this privilege has been extended to persons going and returning on a writ of habeas corpus, except that of *Rex v. Delaval* (a), which is however not precisely like this case. But as it turned out in this instance that the defendant's detention under the former writ was wrongful, and he was driven to his habeas corpus to obtain his liberty, the present case may fairly be considered as coming within the principle whereby parties to a suit, for the sake of public justice, are protected from arrest in coming to, attending upon, and returning from the Court. The rule, therefore, must be absolute with costs, Mr. Blake undertaking to bring no action for this arrest.

Rule absolute.

(a) *Ante*, 313.

—◆—
 BROWN v. DEAN.

A. being arrested at the suit of B., upon a writ indorsed "oath for 76l." C. writes that, in consideration of B.'s instantly discharging A., he will give his promissory note to B. for 10s. in the pound upon the debt on the arrival of the discharge. This engagement may be declared upon as a promise to pay 10s. in the pound upon the debt for which he was arrested.

ASSUMPSIT. The declaration stated, that at the time of the promise, *John Bamford* was detained in the custody of the sheriff of Warwickshire, at the suit of the plaintiff, in an action in the Exchequer, for the recovery of a certain debt, to wit, a debt of 76l., due from *Bamford* to the plaintiff. And thereupon, on 25th January, 1832, in considera-

Although a request to deliver the note he alleged, no request need be proved.

Held, that the production of the writ was sufficient evidence that the sum in dorsed thereon was the amount for which A. was arrested.

tion that the plaintiff would give and procure the discharge of *Bamford* from such detainer and custody, the defendant promised the plaintiff that he would give and send to the plaintiff his promissory note for 10s. in the pound of the said debt: that the plaintiff confiding &c., did give and procure such discharge, and that *Bamford* was discharged accordingly; of which the defendant had notice. Averment, that the defendant was requested to deliver the promissory note, and neglected and refused to deliver or send the same, or pay the amount, and that the 76*l.* still remained unpaid.

At the trial before *Denman*, C. J., at the Warwick Spring assizes, 1833, the plaintiff produced the following letter from the defendant to himself:—"My daughter received a letter from you, saying, if I would give you my promissory note at six months for 10s. in the pound for the debt, and pay the costs, you would give *John Bamford* his discharge. This I will do for the sake of my unhappy daughter and her family. Therefore, if you will instantly send his discharge, on the arrival of it I hereby promise to send you the above note." Postscript, "Please to give the particulars to Mr. *Beaumont*, 52, Lincoln's Inn Fields." The keeper of Warwick gaol stated, that before and on the 26th January, 1832, *Bamford* was in gaol in the custody of the sheriff of Warwickshire; and he produced his commitment at the suit of the plaintiff, and also an authority to discharge him, dated 30th January, and received January 31, by post, under which *Bamford* was discharged. *Steele*, clerk of the late under-sheriff, produced the writ in the action *Brown v. Bamford*, indorsed, "oath for 76*l.*," together with the sheriff's return. To this it was objected that it did not appear that the writ was properly issued, or at what time, and that having been returned by the sheriff it did not come out of the proper custody. *Steele* also produced a supersedeas, tested 11th January, indorsed 28th January. No request to the defendant to deliver the promissory note, as stated in the declaration, was proved.

Adams, Serjt., applied for a nonsuit, on the ground that it

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had not been shewn that *Bamford* was discharged out of custody in consequence of any authority given by the plaintiff; and that no evidence had been given of a debt due from *Bamford* to the plaintiff, or even that the defendant had notice of the amount claimed to be recovered in this action. The learned judge nonsuited the plaintiff, giving leave to move to enter a verdict for the plaintiff for 28*l.*, the amount claimed by the plaintiff's particulars of demand. A rule for this purpose having been obtained,

Adams, Serjt., and *R. Hayes* now shewed cause. The first question is, whether it was necessary to prove, as stated in the declaration, a request and refusal to deliver the promissory note. When there is no antecedent duty, and a party undertakes to do a collateral act, his obligation to do which arises from the promise itself, and no time is specified for its performance, it is a necessary implication that it is to be performed upon request. The reasonableness of inferring that such a previous request was intended is very clear. The general principle is laid down in *Birks v. Trippett* (a), "where a mere duty is promised to be paid upon request; as if, in consideration of all moneys lent to the defendant, he promised to pay them again upon request, no actual request is necessary, but the bringing of the action is a sufficient request; but otherwise it is upon a promise to pay a collateral sum upon request, for there an actual request ought to be made before the action is brought." [*Purke*, J. This is not a collateral promise to pay money on request, but an absolute engagement to give the note.] From the terms of the agreement, it is evident that the defendant understood that some application would be made on the part of the plaintiff. If it appear from the terms of the undertaking that a request was contemplated, the Court will hold a request to be necessary. The distinction taken in the case of *Birks v. Trippett*, is between a duty and a collateral act. Here, it is quite clear that there was

(a) 1 Saund. 32.

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no precedent duty. It was a collateral act. The duty to be performed arises entirely from the promise. Although the cases generally turn upon the question, whether there was an antecedent duty or not, they sometimes also turn upon the nature of the contract itself, and the inquiry is, whether the act to be done is of a collateral nature or in its own nature a duty. Several of the cases shew that a request may be necessary, although it be not so expressed. In *Bach v. Owen* (a), the declaration stated, that it had been agreed that the plaintiff should give the defendant a colt in exchange for his mare, and should, on the 17th Dec. following, pay him two guineas to boot; that it had been further agreed that the plaintiff should keep the colt until 29th Sept. following: that mutual promises were made, and that the plaintiff paid a halfpenny in earnest of the bargain: so that there was no allegation of a promise to do an act *on request*. The declaration goes on to state that the plaintiff kept the colt until 29th September, and that he was ready and willing, and offered to pay the defendant the two guineas, and requested him to accept that sum, but that the defendant would not receive the same, and had not delivered the mare, although often requested so to do. Yet the Court held, upon general demurrer, that the declaration was defective, because the plaintiff had not alleged that he had made any *special request* to the defendant to deliver the mare. Here, the declaration states a special request, but none was proved. [Denman, C. J. The promise is so direct here to send the note upon the arrival of the discharge, that my only doubt was upon the amount promised to be paid by the note. I thought the fair meaning was, that he would pay 10s. in the pound upon the amount really due, and not upon the sum for which *Bamford* was arrested.] The plaintiff was under the necessity of proving that a debt was really due from *Bamford* to him, yet the only evidence given was the indorsement upon the writ. The plaintiff

(a) 5 T. R. 409.

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could not make this operate as an admission that this sum was due, because it is not shewn that the defendant was privy to it. The defendant had not admitted a debt to any particular amount. Then the question is, whether there was any evidence that a debt to the amount of 76*l.* was due according to the averment in the declaration. The plaintiff must prove the debt in the terms alleged in the declaration. If he had said that the party was detained for a certain sum of money indorsed on the writ, and that the defendant had engaged to pay 10*s.* in the pound upon that sum, that might have been sufficient. It is a clear principle that when a party makes a necessary allegation with unnecessary particularity, he is bound to prove it as alleged. In *Williamson v. Allison* (a), *Lawrence, J.* says, "with respect to what averments are necessary to be proved, I take the rule to be, that if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, though the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover." *Parker v. Fenn* (b), *White v. Jones* (c). The plaintiff has stated that *Bamford* was indebted; he must therefore prove a debt. *Lee v. Eyrton* (d). In an action against the sheriff for an escape, it is sufficient to state that the party was arrested by virtue of a writ indorsed for bail for a certain sum of money. Yet where in such an action the declaration alleged, that *J. S.* was arrested "under a writ indorsed for bail, by virtue of an affidavit now on record," it was held that the affidavit must be produced in evidence, because there was a substantive allegation of its existence; *Webb v. Herne* (e). [*Taunton, J.* In the present case, the undertaking itself recognizes the existence of some debt. This distinguishes it from those

(a) 2 East, 446.

(b) 2 Esp. N. P. C. 477.

(c) 5 East, 292:

(d) Peake, N. P. C. 119.

(e) 1 Bos. & Pull. 281; S. C. 2 Esp. N. P. C. 673.

cases where there is no such admission. *Denman*, C. J. This brings it to the question, whether the meaning of the agreement was that he should give 10s. in the pound upon the sum for which he was arrested, or upon the debt actually due. According to your argument, if the sum actually due were 150*l.*, he would be bound to pay 10s. in the pound upon that amount.] Yes. There is no ground for saying that he promised to pay 10s. in the pound upon a debt of any particular amount. The plaintiff has totally failed to prove a debt of any particular amount, and therefore, if it be held that the agreement itself contains an admission of *some* debt, the plaintiff would be entitled to recover nominal damages only; for if no particular sum be proved, the defendant has a right to say that it is of the smallest possible amount, and that his promise was to pay 10s. in the pound upon that, which would be an unreasonable construction of this undertaking. In *Bernasconi v. Anderson* (a), it was held that an acknowledgment of a debt without specifying the amount, is not sufficient to entitle the creditor to nominal damages upon an account stated. In *Green v. Davies* (b), it was held, that a promise to pay interest where there was no evidence as to the debt, though an admission that some debt existed, did not entitle the plaintiff to a verdict even for nominal damages.

Goulburn, Serjt. and *M. D. Hill*, contra. There was no ground for this nonsuit. The question at the trial was, whether, to entitle the plaintiff to a verdict, it was necessary to prove an actual debt, or it was sufficient to shew the amount for which *Bamford* was arrested. Now, a further point is raised, that the declaration does not properly describe the agreement. It is submitted that since the passing of Lord *Tenterden's* act (c), which enables the judge at nisi prius to amend the record where there is a variance between the pleadings and the written document, the Court

(a) *Moody & Malk*. 183.(c) 9 *Geo.* 4, c. 15.

(b) 4 B. & C. 235.

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Nonsuit entered upon ground different from point reserved.

Amendments under stat. 9 Geo. 4, c. 15.

will much narrow the liberty of raising such a point as this, upon motion for a new trial, by a party who has omitted to take the point at a time when the defect might have been remedied. [*Parke, J.* It happens often that a judge reserves leave to move for a nonsuit on one point, and the Court will enter the nonsuit upon another point not then raised. The difficulty against you is as to whether the meaning of the agreement was to promise to pay half of the sum really due, or half of that for which *Bamford* was detained.] To allow this point to be raised now, would be to impair the good effect of the statute. [*Denman, C. J.* I should not have amended, I think, in this case, because the question as to whether the agreement was well stated would have been the result of a long argument as to the nature of the agreement. I should only amend where there was some obvious mistake in setting out the instrument.] It is impossible to read the guarantee, and not be satisfied that the debt contemplated was that for which *Bamford* was in custody, and that the promise to send this note was the consideration for the discharge. The discharge was also the consideration for the promise; and it would be absurd to say that the promise would, in such case, be a promise to pay half an unascertained debt, whatever might be its amount. The substance of the averment in the declaration is, that *Bamford* was detained and in custody for 76/., and that in consideration of his discharge, the defendant promised to pay 10s. in the pound upon *that* sum. The declaration says, that in consideration that the plaintiff would give and procure the discharge of *Bamford* from such detainer and custody, the defendant promised the plaintiff that he would give and send the plaintiff his promissory note for 10s. in the pound upon the *said* debt; that is equivalent to saying, "the sum for which he was detained," the consideration being the discharge from the detainer. The defendant, for the purposes of this cause, stands in the place of *Bamford*. The indorsement on the writ, if brought home to *Bamford*,

would be evidence against him that he knew the amount for which he was arrested. [*Denman*, C. J. I do not think this indorsement is evidence even against *Bamford*, otherwise that would be a very short way of proving a debt.] It is submitted that it is *prima facie* evidence when the party does not object to it. [*Parke*, J. Certainly the indorsement is no evidence whatever.] The guarantee is evidence that a debt of a certain amount had been ascertained to be due from *Bamford* to the plaintiff. The agreement is to pay the half of an ascertained sum, which is shewn by the evidence to be the sum of 76*l.*; and the declaration is for a debt due, to the amount of 76*l.* [*Patteson*, J. There is a postscript, which directs the particulars to be furnished, referring probably to the costs. That goes to shew that the promise was to pay an ascertained debt. Cases have been cited to shew that the admission contained in the guarantee does not entitle the plaintiff even to nominal damages. *Green v. Davies* does not support the proposition. The objection there was, that it did not appear what was the nature of the debt upon which the interest was paid, in what character it was due to the plaintiff, or whether it was one for which *assumpsit* would lie. Besides, in this case the defendant promises to pay 10*s.* in the pound; so that the least possible amount would be 1*l.*, and the plaintiff may upon that recover the 10*s.*]

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DENMAN, C. J.—In this case the proceedings are upon a very special agreement, contained in a letter from the defendant to the plaintiff. (His lordship then read the letter.) Several points have been taken. As to the question whether a special demand of the note was necessary, I believe there is no doubt in any part of the Court that it was not necessary (*a*). As to the sum upon which the payment of 10*s.* in the pound was promised to be made, it occurred to me that the plaintiff should have proved what

(a) And see *Lilley v. Hewitt*, 11 Price, 494.

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was the debt actually due; but I now think that such evidence was given as, according to the meaning of the contract, was sufficient to establish this plaintiff's claim. I think the contract is set out according to its meaning in the declaration. The declaration states that *Bamford* was in custody at the suit of the plaintiff, in an action brought to recover a certain debt due, *to wit, a debt of 76l.*; and thereupon, in consideration that he would discharge *Bamford* from such detainer, the defendant promised the plaintiff to send him his promissory note for 10s. in the pound *of the said debt*, that is, the debt for which *Bamford* was detained in the action. The question then is, for what debt that action was brought. The detainer being for 76l., and the undertaking having referred to the detainer, it is fair to assume that the parties understood and had ascertained the debt to be the amount for which *Bamford* was arrested, and which was stated in the declaration at 76l. Therefore it appears that there is no variance; but, on the contrary, that there was evidence to support the declaration. The undertaking having reference to the debt for which the party was detained, and the act of parliament requiring the amount for which a party is held to special bail, or detained in custody, to be indorsed upon the writ^(a), I think the writ and indorsement are evidence to shew the amount for which *Bamford* was arrested.

PARKE, J.—In this case I think the rule must be made absolute to enter a verdict for the plaintiff. At one time I was disposed to think that there was a variance; but upon looking more narrowly into it, I think the declaration may be supported, although I do not say this without any doubt. The declaration states that the party was detained in an action for recovery of a certain debt, *to wit, a debt of 76l.*, due from him to the plaintiff; that is to say, that an action was brought for the recovery of a *debt*, and that *that debt was due*. It then proceeds to set out the

(a) *Sed vide post*, 327.

agreement, of which the letter is the evidence given. It states that in consideration that the plaintiff would discharge *Bamford* from such detainer in the said action, the defendant promised to give him his promissory note for 10s. in the pound of the said debt, that is, of the debt due and for which the action had been brought. Then, looking at the contract, I think Mr. *Hill's* construction is right, that the promise was to pay the half of an *ascertained* debt. There is no evidence that the parties had any doubt as to the amount; and from the tenor of the letter, it appears that the defendant knew the amount, and promised to pay 10s. in the pound upon it. Therefore, I say, the letter operates doubly; as an admission of the amount due, and a promise to pay the half of it. The defendant says, "If you will instantly send his discharge, *on the arrival of it* I hereby promise to send you the above note." It must be taken that he understood clearly what the debt was; for he makes no stipulation for further inquiry as to the amount. Then the only remaining question is, for what amount that action was brought. The act of parliament^(a) requires the amount for which a party is arrested to be indorsed on the writ; and therefore I think the indorsement is evidence of the amount for which the action was brought; consequently the objection to the declaration cannot be maintained. With regard to the objection that no request was made to the defendant to send the bill, that appears to have been decided already. No request was necessary. There can be no doubt that it was an absolute promise to send the note upon the receipt of the discharge.

TAUNTON, J.—With regard to the minor objections, an answer was given in the course of the discussion: I certainly concur in what was said. Upon the main points my opinion has very considerably fluctuated during the course of the argument, and it is now directly contrary to what it was at first, and I think now that the plaintiff is entitled

(a) 12 Geo. 1, c. 39, s. 2, and 2 Will. 4, c. 39, Sched. No. 1.

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to have a verdict entered for him. All the averments in the declaration are proved; none of them goes beyond the evidence. The declaration states that *Bamford* was detained in custody at the suit of plaintiff, in an action against *Bamford* in the Exchequer; there is no doubt about that; and brought for the recovery of a certain debt, to wit, 76*l.*, due from *Bamford* to plaintiff. I am of opinion that within the terms of the guarantee or undertaking, although there was no extrinsic evidence of any debt due from *Bamford* to the plaintiff at the trial, when the defendant says that he will give a promissory note for *the debt*, and *pay the costs*, upon the arrival of the discharge, it appears to be an *admission* that there was a debt due to the amount for which the action was brought. He acknowledges a debt due from *Bamford* to *Brown*. That the action was brought for a certain debt due from *Bamford* to the plaintiff, is perfectly clear. Then, as to the amount, that is said not to be proved. In the declaration the amount is said to be 76*l.*, though that is put under a *videlicet*. It appears that the former action against *Bamford* was brought for the recovery of a debt of 76*l.* Of that, the best possible evidence is given, namely, the indorsement on the writ. It is proved therefore that the action was brought for the recovery of 76*l.*, due from *Bamford* to the plaintiff. I am therefore of opinion that each of these averments is proved separately. I did think at one time that the guarantee had been given for the payment of half of the sum for which the party was arrested, and that the declaration alleged that he had promised to pay upon the sum really due. This, I now think, is not the real nature of the allegation contained in the declaration.

PATTESON, J.—I am also of opinion that the rule should be made absolute. The main point is that as to the variance between the guarantee sent by the defendant, and the allegation in the declaration, founded upon that guarantee, although no objection on the ground of this va-

riance appears to have been taken by the defendant's counsel at the trial. But supposing that we had been fully satisfied that the variance existed, yet it would have been quite idle to send the cause down again, because after the discussion which has now taken place, such variance would be amended at the trial. I think however that there is no variance. The declaration states a detainer for a debt upon which the action had been brought. By the guarantee, the defendant promises to pay the debt and costs. From that it pretty clearly appears that it was a promise to pay a debt existing between the parties, and that the debt had been ascertained as to the amount. There is a postscript that referred to costs, which constituted an *unascertained* part of the debt. To my mind it was a promise to pay 10s. in the pound upon the sum for which the discharge was so given, which sum was the amount for which the action had been brought. The indorsement shews the amount which the party claimed in the action to have been 76/. The averment in the declaration of a demand of the promissory note, was certainly not proved, but it was not necessary that it should be proved.

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PARKE, J.—I stated that the amount of claim should be indorsed upon the writ; but upon looking at the act of parliament, I find it is not so (*a*). That, however, makes no difference in the judgment.

Rule absolute.

(*a*) i. e. not in the body of the act, 2 Will. 4, c. 39; but schedule No. 4, after giving the form of the writ of *capias*, directs the following

“Indorsements to be made on Bail for £—— by order of [naming the writ of *capias*: the judge making the order].
Bail for £—— by affidavit; or Dated the —— day of ——.”

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In the Matter of the Arbitration between E. R. TUNNO
and BIRD.

An umpire may be appointed by lot with the assent of the parties.

Such assent sufficiently appears by each party presenting three names, from which that of the umpire is to be drawn ;

Or by the parties signing the memorandum by which the person whose name is drawn is appointed umpire.

After a submission by deed an arbitrator may, with the assent of both parties, be substituted in the place of one of the original arbitrators.

Seemle, that such substitution would constitute a new submission by parol, and that an award under such new submission could not be enforced by attachment.

IN Easter term last, *D. Pollock*, on behalf of *Bird*, had obtained a rule nisi to set aside an award, on the grounds, 1st, that the umpire had been appointed by lot; 2dly, that one *Lakin* had not been lawfully appointed arbitrator; 3dly, that the arbitrators had not differed, and therefore the umpire, if lawfully appointed, had no jurisdiction; and 4thly, that the umpire had made his award without hearing the evidence. The affidavits on which the rule was granted stated as follows :

Bird proposing to quit a farm, which he held by an agreement under *Tunno*, disputes arose upon a claim made by *Tunno* under the agreement, and as to the compensation to be paid to *Bird* for quitting. By a submission under seal all matters in difference were referred to the arbitrament of *A. Murray* and *W. Jellicoe*, or in case they should not agree, then to the determination of such third person as they should appoint by writing, previously to their entering upon the reference.

The arbitrators lived in the country, and it was agreed that an umpire should be chosen in London. The agents of both parties met in London, and chose *Staples* as umpire, in the following manner. The names of three persons were proposed on behalf of *Tunno*, and the names of three other persons on the behalf of *Bird*. The six names were written on different slips of papers, which were folded up and placed in a hat. It was agreed that the person whose name should be first drawn out should be the umpire. The hat was shaken, and the agent for *Tunno* then drew out one of the pieces of paper, upon which was written the name of *Staples*, who was accordingly considered as the umpire.

Lakin was subsequently appointed an arbitrator in the place of *Jellicoe*.

Lakin and *Murray* proceeded in the reference, and examined the state of the premises, during which examination they were accompanied by *Staples*.

On the 23d November, *Staples* stated to *Bird* that he could not stay any longer, upon which *Bird* remonstrated with him and desired him not to depart, as he had several witnesses, whom he wished to be heard by him as well as by the arbitrators, but notwithstanding this request, *Staples* did not remain to hear *Bird's* witnesses. In consequence of some offensive expressions used by *Lakin*, respecting *Tunno*, *Murray* refused to meet *Lakin* again on the reference. *Lakin*, however, proceeded to examine witnesses for *Bird*, and subsequently carried the examinations of the witnesses to the umpire, but neither of the arbitrators formed any judgment or came to any decision upon the merits of the case, nor did they differ in opinion on the general merits of the case.

The affidavits filed in opposition to the rule stated,

That previously to *Staples'* being chosen as umpire, in the manner above mentioned, the names of three persons were reciprocally given by the one arbitrator to the other, and approved by each; and that subsequently to *Staples* being chosen umpire, a meeting took place, which was attended by *Bird* and his attorney, and that a memorandum was indorsed upon the agreement for reference, appointing *Staples* umpire, and this agreement was signed by *Bird's* attorney in his presence :

That *Lakin* was substituted for *Jellicoe* at *Bird's* express request, and a memorandum substituting *Lakin* for *Jellicoe* was signed by *Bird*, and his signature attested by his attorney :

That *Staples* was requested to prolong his stay for the purpose of hearing witnesses, but that he declined to do so, upon the ground that he considered it unnecessary for him to remain, and not upon the ground that he could not stay any longer; that *Staples* at the same time stated to *Murray* and *Lakin*, that if, on receiving the statements of

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the arbitrators, it should appear to him necessary to obtain additional evidence and information, he would call a meeting of all the parties at Gloucester for that purpose:

That the umpire was referred to because the arbitrators did not agree.

Campbell, S. G. (with whom was *Crowder*) now shewed cause. *Bird* has given up the farm to *Tunno*, yet he now wishes to revive the dispute and go over the whole of the matters which have been disposed of by this arbitration.

First point:
Appointment
of umpire by
lot.

As to the first objection, *Ford v. Jones* (a), which may be relied on by the other side, merely determined that parties who agree to refer their disputes to arbitrators, are entitled to the individual judgment of each arbitrator (b) in the choice of an umpire. But the Court has never decided, that where subsequently to the submission to arbitration the parties agree that an umpire shall be chosen by lot, such subsequent agreement is invalid. There can be no reason why an umpire should not be appointed by lot, since it is the practice to choose jurors in a similar manner. The umpire was chosen by lot by the agents of both parties, and the person upon whom the lot had fallen was appointed umpire by a memorandum actually signed by *Bird* himself, in the presence of his own attorney.

Second point:
Irregular substitution of
new arbitrator.

As to the second objection, that *Lakin* was not regularly substituted in lieu of *Jellicoe*, the answer is obvious, namely, that the agreement appointing *Lakin* an arbitrator was also signed by *Bird*.

Third point:
No jurisdiction in umpire.

As to the third and fourth objections, that the arbitrators did not differ, and that the umpire made his award without hearing the evidence, *Lakin* heard all the evidence, and went to *Staples*, and delivered to him all the papers and documents given in evidence, which shews that he thought

(a) 3 Barn. & Adol. 248.

the lists from which the name was to be drawn.

(b) By the affidavits it appears that each arbitrator assented to

that he and *Murray* had been unable to come to any decision. *Campbell* was here stopped by the Court.

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First point.

D. Pollock and *Lumley*, contra. The cases of *In re Cas-sell* (a), and *Ford v. Jones* (b), shew that an umpire cannot be chosen by lot, even if the parties are present. The umpire should be appointed by the arbitrators, and they should be acquainted with the character of the person whom they appoint (c). It was suggested to *Bird* to appoint an umpire by lot, and he consented to that appointment because he thought that was the usual mode. In this respect the present case is precisely similar to that of *Ford v. Jones*, as there the umpire was appointed by lot, and the parties were present.

The submission here was by deed, and the consideration for the reference being the surrender of the lease to *Bird*, there could not be a submission by parol of the matters of this reference. The subsequent memorandum containing the appointment of *Lakin* as arbitrator, by an agreement not under seal, cannot be considered as another parol submission to *Lakin* and *Murray*. The subsequent agreement cannot alter the terms of the original submission, as that would be to permit an alteration by parol, of the terms of an instrument under seal (d).

Second point.

The arbitrators did not differ in opinion. The umpire was to act only in case they should differ. It would not be sufficient to shew that they had differed merely at the outset of the case.

Third point.

The mode in which the arbitration was conducted, may be considered as the merits of the case. The umpire refused to hear further evidence. [*Parke*, J. He did not think it necessary. You make no complaint at the time when the umpire says he will hear further evidence if necessary.] The two arbitrators acted as advocates on their

Fourth point:
Refusal by
umpire to hear
evidence.

(a) 4 Mann. & Ryl. 555; 9
Barn. & Cressw. 624.

(b) 3 Barn. & Adol. 248.

(c) *Vide ante*, 330 (b).

(d) See *Rex aux. Hollis v. Bing-*
ham, 3 Younge & Jervis, 101.

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respective sides. Each made out a statement and carried it to the umpire. From *Hall v. Lawrence* (a) it would appear, that if an umpire receive the evidence from the arbitrators, and is requested afterwards to re-examine the witnesses, and refuses to comply with that request, the Court will set aside his award. Here the umpire assumes to hear the evidence just so far as he thinks necessary. If *Bird* had known that the umpire intended to make his award so soon, he would have called upon him to rehear the whole of the evidence. *Bird* had no opportunity of tendering further evidence. [*Taunton, J.* You lie by and take the chance of the award, and then complain that the umpire has not heard all the evidence.] *Bird* did not know how the matter had proceeded, and the umpire made his award without giving notice that he thought it necessary to hear the evidence.

First point.

DENMAN, C. J.—I am of opinion that this rule should be discharged. The objection that the umpire was chosen by lot does not appear to arise, and the case *Ex parte Cassell* does not apply. In that case it is said by the Court, with reference to the appointment of an umpire by arbitrators, “the appointment of the third person must be the act of the will and judgment of the two; it must be matter of choice, and not of chance, *unless the parties consent to or acquiesce in some other mode.* In this case the parties did acquiesce, and therefore that case is not in collision: There is some more general language in *Ford v. Jones*, but I cannot help thinking that that case turned upon some difference in the affidavits filed, because *Littledale J.* says, “It is alleged here that the parties themselves, at a meeting with the arbitrators, assented to the proceeding by lot, *but such assent must always be matter of doubt.*”

Second point.

As to the second objection, that *Lakin* was not properly substituted in the place of *Jellicoe*, I cannot conceive how *Bird* can make that objection now, he having with his own

(a) 4 T. R. 589.

hand signed the agreement to substitute the one for the other.

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Third point.

As to the objection that the arbitrators did not differ in opinion, that took place between them which shewed there was a difference in opinion, and which put an end to their authority. *Lakin* evidently thought so, as he delivered depositions to the umpire.

With respect to the last point, there is no absolute necessity for an umpire to hear the evidence; though if the parties require the umpire to hear the evidence, he would not be justified in refusing to do so. In this case the umpire has not refused; because at the time the refusal is said to have taken place, *Stuples* was not an umpire; there was therefore no refusal in the character of umpire. Subsequently *Lakin* handed over to the umpire the depositions of twelve witnesses, who had been examined on behalf of *Bird*, and no application is made to him to hear the evidence. It does not appear that *Bird* knew this; but he knew that an umpire had been appointed. *Bird* must be supposed to have heard what had taken place, and he should have requested the umpire to hear the evidence, if he thought it important that the evidence should be reheard. He did not do so, but took the chance of the umpirage, and has thereby waived all previous irregularity.

Fourth point.

PARKE, J.—I am entirely of the same opinion. Arbitrators are *prima facie* to exercise their judgment in the appointment of an umpire; but parties may make a new agreement that the umpire shall be appointed by lot. Certainly, if it be actually agreed that the arbitrator shall be appointed in this way, that will be evidence of another and different submission. Whether the new submission could be enforced by attachment, is another question. *In re Cassell* it was decided that the umpire must be chosen by the arbitrators and not by lot. The case of *Ford v. Jones* has done no more than confirm *In re Cassell*. The evidence of the party's assent in *Ford v. Jones* was not clear.

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Second point.

There cannot have been any very distinct evidence of assent, because the Solicitor-General does not mention it in the course of his argument. If however there had been, I should not feel myself bound by the authority of that case. The observation made with regard to the first objection applies also to the second. By the original agreement two parties were appointed arbitrators, who alone were to name the umpire. When a new arbitrator was subsequently appointed, that appointment constituted a new submission, not under seal, incorporating all the remaining provisions of the former submission.

First point.

TAUNTON, J.—Upon the second, third, and fourth objections, I need not say more than has already been advanced. Upon the first objection I will say a word or two in addition, not because I disagree with my lord and my brother *Parke*, but because I was a party to *Ford v. Jones*, which is supposed to be similar to this case. If it were so, I should require time to consider whether *Ford v. Jones* was good law. But I do not think that the case now before the Court clashes with the case of *Ford v. Jones*, or with that of *In re Cassell*. In the latter case, Lord *Tenterden* says, “the appointment of the third person must be the act of the will and judgment of the two, must be matter of choice and not of chance, unless *the parties consent to or acquiesce in some other mode.*” Here, there is ample evidence of the parties’ consent or acquiescence. *Bird*, in the first instance, knew and approved of the names of the six persons proposed, and took a part in those names being subjected to an election by lot. It appears also that after the umpire had been chosen by lot, there was an appointment in writing, signed by the two arbitrators in the presence of *Bird* himself, and that the agent of *Bird* attested the instrument whereby *Staples* was appointed umpire. The appointment by lot might be thrown out of the question, because here is a sufficient appointment without it. This therefore is sufficient to dis-

tinguish the present case from that of *Ford v. Jones*. To hold the appointment of the umpire to be in this case invalid, would be to impeach the solemn act of the parties.

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PATTESON, J.—I agree entirely with my lord and the rest of the Court. The objection that the umpire, when requested, would not hear the evidence, is answered by the fact of the umpire, at that time, not having taken upon himself the burthen of the umpirage. Fourth point.

As to the first objection, I was a party to the decision of *Ford v. Jones*. I confess I have no very distinct recollection of the mode in which the case was presented to the Court; but I think the evidence of acquiescence was not very clear in that case, because, on looking at the report, I find the Solicitor-General in his argument, as it is there given, says not one word about it. According to my recollection, the decision of the Court did not turn upon the point of acquiescence. Indeed, if the parties themselves have agreed that the umpire shall be chosen by lot, I hardly think the Court would have the power to contravene the express agreement of the parties. In the present case there can be no doubt but that the parties did actually agree to the appointment of an umpire in this particular mode. First point.

#### Rule discharged, with costs(a).

(a) In the case of *James Twogood v. William Twogood*, on a subsequent day in this term, *Follett* moved to set aside an award or umpirage, on the ground that it had been made without either of the original arbitrators joining in it, by an umpire who had been appointed after the evidence had been gone through, and who had not reheard the evidence. The

Court refused to grant a rule to shew cause upon any of these three grounds of objection. It did not appear by the affidavits filed in this case, that by the terms of the submission the umpire was to be appointed before the original arbitrators should have proceeded in the reference, as in *Tunno* and *Bird*, or that he had been requested to rehear the evidence.



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## LOCK v. VULLIAMY.

A letter from an arbitrator to *A.* and *B.*, the parties, in which he says, "To meet the circumstances of the case in a liberal manner, I propose that *B.* shall pay *A.* 10*l.*," is not an award.

The payment of the 10*l.* cannot therefore be enforced by *A.*, nor, in an action by *A.*, upon the antecedent cause of action, can *B.*, paying the 10*l.* into court, avail himself of the award as a bar to any further demand.

**ASSUMPSIT.** Plea, general issue. At the trial before *Patteson*, J., at the sittings after Hilary term, it appeared that the action was brought to recover 26*l.* 12*s.* as wages, at the rate of 2*l.* 2*s.* per week. The defendant was an architect, and the plaintiff had been in his office from the 22d day of September to 26th of December, 1831, when he quitted the defendant's service. It was matter of dispute between the parties whether the plaintiff had gone into the office of the defendant merely for the sake of improvement, or whether he was to be paid for his services. This dispute having been referred to Mr. *Goldicutt*, a mutual friend, *Goldicutt* wrote the following letter, addressed to the defendant's attorney and to the plaintiff:

" Clarges Street, Jan. 21st, 1832.

Gentlemen,—I have examined the drawings made by Mr. *Charles Lock*, with an account of his time, in his presence, at Mr. *Vulliamy's*, which do not bear testimony of experience or ability to the extent to justify him in making a demand for remuneration under the circumstances which he came to that gentleman's office. But in consideration of his services out of the office on some occasions, and to meet the circumstances of the case in a liberal manner, I propose Mr. *Vulliamy* should pay Mr. *Charles Lock* ten pounds.


I remain, Gentlemen,

Your obedient servant,

*John Goldicutt.*"

This letter was sent to the defendant, who did not communicate it to the plaintiff, nor was he aware of its existence until after the action had been commenced. The defendant paid 10*l.* into Court, and contended that the letter was an award, and that the plaintiff was therefore precluded from maintaining the present action. The learned judge told the jury that the letter was not an

award, and they found a verdict for the plaintiff. In Easter term last Sir *J. Scarlett* obtained a rule nisi for a new trial, on the ground of misdirection by the learned judge; against which

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*F. Pollock* now shewed cause. This letter is not an award. The determination of the arbitrator is not an award until publication. Now here the letter which is set up as an award, was sent to one party alone, and no notice of such transmission was given to the other party, which is no more a publication by the arbitrator than there would be if he should keep it locked up in his own desk. It need not be contended that if the letter had been kept locked up in the arbitrator's desk, there would have been no publication, and consequently it would have been no award. If then no award was made at the time when the action was commenced, the bringing of the action determined the authority of the arbitrator.

But what is the effect of the letter itself? Is it an award for 10*l.*, or for nothing? If it be an award that nothing is due, and published after action brought, it ought to have been pleaded. It was not intended to be an award of nothing. There were two grounds of claim: upon one, the arbitrator says *Mr. Lock* is entitled to no remuneration; and as to the other, he proposes that *Mr. Vulliamy* should be liberal, and pay 10*l.* *Mr. Lock* could not, upon such an award as this, recover the 10*l.* As an award of 10*l.*, it binds nobody. The award should be perfectly clear. It should not be such an award as would conclude one party, without enabling him to recover upon the award the sum adjudged to him.

Sir *J. Scarlett* and *R. V. Richards*, contra. Papers similar to this have been held to be awards. In *Matson and another v. Trower and another* (a), these words were held to be an award:—"I am of opinion that Messrs. *Matson* and Co. are entitled to claim of Messrs. *Trower* and Co.

(a) Ryan & Moody, 17.

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134*l.* for non-performance of their contract for fifty puncheons of brandy." It was objected that this was not an award, but only the expression of an *opinion*; but Lord *Tenterden* said, "The words of the instrument are indeed not formal or technical, but they amount in substance to an award." There is no particular form of words necessary to constitute an award. The arbitrator in this case knew the circumstances under which the plaintiff came into the office of the defendant, and on that ground he was selected as referee, and he makes this award—of nothing for his services in the office, and of 10*l.* for his services out of his office. Where an arbitrator says, "I *propose* so and so," that is as strong an intimation of his opinion as if he had used the words employed in the case of *Matson v. Trower*, and it is an award. Where an award is made by a person not of the legal profession, the Court will not look for much preciseness in the language. It is sufficient if the opinion can be clearly collected from the award. Upon the face of this paper no one can doubt that the meaning of the words was, that the arbitrator was of opinion that Mr. *Lock* was entitled to 10*l.* and no more.

DENMAN, C. J.—I think that this is no award. Two claims are preferred for two sets of services. Two claims having been made, the matter is referred, and the person to whom it is referred clearly thinks that the instruction received was a full compensation for the first set of services. Then, as to what the arbitrator has said relative to the second set of services, I quite agree with the argument, that no technical form of words is necessary to make an award, and that it is sufficient if the opinion be clearly expressed; but that is not the case here. I infer from the words here used that the arbitrator did not intend to express it as his opinion that Mr. *Lock* was *entitled* to 10*l.* He says, "I propose that if you choose to do a liberal thing, you should pay Mr. *Lock* 10*l.*" In *Matson v. Trower* the award was perfectly good,

PARKÉ, J.—This rule ought to be discharged. I quite agree with the argument that no technical words are necessary if the opinion be expressed. But here it does not appear to me clear from the words that the arbitrator meant to say that the plaintiff was *entitled* to anything. I do not think he could sue for the 10*l.* upon this award; therefore I think this would be an award which would bar the action without giving the plaintiff anything for his services. I do not think that the arbitrator meant to conclude the parties by his suggestion.

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TAUNTON, J.—I am of the same opinion. I do not see any difficulty whatever in this case. The former part of this letter relates to services performed in the office; and I think *it is* an award that, as to that part of his claim, he is entitled to nothing; but as to the latter part, I think it is no award. As to the services done out of office, the arbitrator decides nothing. All he says is, “to meet the circumstances of the case in a liberal manner, I propose Mr. *Vulliamy* should pay Mr. *Chas. Lock* 10*l.*” I conceive that not to be any decision on his part. He is only treating the matter in a liberal point of view, and submits to the party’s consideration that he should be *liberal*, and give 10*l.* *Matson v. Trower* is very different. There the arbitrator says, I am of *opinion* that the plaintiff is *entitled* to claim so much from the defendant for the non-performance of his contract. There a decisive opinion is pronounced that the plaintiff was entitled to be paid so much by the defendant. I think the learned judge was perfectly right in holding that this plaintiff was not concluded by this instrument.

PATTESON, J., concurred.

Rule discharged.

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The KING v. The HUNGERFORD MARKET COMPANY.  
In the matter of MARY YEATES.

When a statute authorizes a Company to remove and erect buildings, and provides a specific remedy for parties injured by such removal and erection, the occupier of a house adjoining one that has been pulled down and rebuilt by the Company, is not entitled to such remedy in respect of injury sustained by reason of the removal of a party-wall between the two houses, after a notice given under the Building Act; although the Company may not have strictly complied with the requisitions of the Building Act in respect of such party-wall.

**I**N Easter term last *F. Kelly* obtained a rule nisi for a mandamus commanding the Company to issue a warrant to the high bailiff of Westminster, requiring him to empanel a jury pursuant to the directions of the Hungerford Market Act, (11 *Geo.* 4, c. lxx. (a),) for the purpose of assessing compensation to be made to *Mary Yeates* for the damage sustained by her in respect of her premises, situate and being No. 23, in the Strand, by reason of the taking down by the said Company of the house and premises No. 22, in the Strand, for the purposes and in execution of the act.

From the affidavits filed on behalf of *Mrs. Yeates* the complainant it appeared, that she was tenant of No. 23, in which she carried on business; that the Company, under the powers of their act, had purchased the adjoining house, No. 22; that in August, 1832, they, in pursuance of the Building Act (14 *Geo.* 3, c. 78,) gave notice (b) to *Mrs. Yeates* that the party-wall between the two houses was out of repair, and required her to appoint two surveyors to meet, on the 17th November, 1832, certain surveyors on the part of the Company, to view the party-wall and to certify the state and condition thereof, and whether the same ought to be repaired or pulled down and rebuilt: that previously to the 17th November, the Company, without the concurrence of *Mrs. Yeates*, began to take down No. 22, whereby the complainant was greatly injured in her business: that on the 2d of November, she received a certificate from the surveyor of the Company, signed by him and three other surveyors, that the party-wall was out of repair and required to be pulled down and rebuilt: that shortly after the service of this certificate, the Company began to pull down the

(a) *Vide ante*, vol. i. 404, 548. giving notice, *vide Peck v. Wood*,

(b) As to the necessity for 5 T. R. 130.

party-wall and to rebuild the same, and in so doing injured the house of the complainant: that in consequence of this she was unable to occupy the house, and was obliged to provide herself with lodgings.

The affidavits in answer stated, that the Company having determined to take down the houses on the east side of Hungerford Street, in order to widen the street and to erect other houses, the necessary directions were given to the surveyor to superintend the same: that the surveyor, in examining No. 22, found the party-wall insufficient, and gave the above notice: that shortly after the first-mentioned notice was left at the house of *Mary Yeates*, her son had a conversation with the surveyor of the Company, in which he informed him, that in order that no time should be lost, he was willing to have the party-wall surveyed without delay, and he would therefore waive the time mentioned in the notice, and that the survey of the wall might take place as soon as it might be convenient for the surveyor to be appointed on the part of the landlord. On the 2d November the surveyors on the part of the Company and of the landlord met and surveyed the party-wall, and after having so done returned the certificate above mentioned: that the house of *Mary Yeates* was shored up preparatory to and during the taking down and rebuilding of the said party-wall: that no unnecessary delay took place, and that since the said party-wall had been built, it had been arranged with the landlord that he should pay 100*l.* as a moiety of the expense of building the party-wall.

Sir *James Scarlett* (with whom was *Follett*) now shewed cause. Mrs. *Yeates* has no right to compensation from the Company under the 68th section of the act, for damage or inconvenience sustained by reason of the pulling down and rebuilding of this party-wall, for her house was not, as is expressed in that section, "damaged or injured by or in the taking down of any of the messuages or buildings to be taken down for the purposes of, or otherwise in the execu-

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tion of this act." The damage resulted from the taking down the party-wall. If it be said that the Company, by proceeding to pull down the wall before the expiration of the term for which the notice was given, have departed from the provisions of the Building Act, and have acted upon their own responsibility, the answer is, that neither the landlord nor the tenant required that it should expire. The damage did not result from the Company's taking down the wall, but from the circumstance of the wall's requiring to be taken down. This is the ordinary case of the owner of a house not thinking the party-wall between his house and that adjoining, safe.

*E. Kelly and Stammers contra.* The application is made not on the part of the landlord, but by an occupier who has a lease. The landlord could not suffer any injury if the wall was to be rebuilt, and therefore he might be easily satisfied; but the occupier suffers a very serious injury by the taking down of the adjoining house and of the party-wall. The damage was occasioned by the taking down of a building for the purposes of the act, and therefore Mrs. *Yeates* is entitled to some compensation. The only question is, whether the Company, in what they did respecting the taking down of the party-wall, acted *bonâ fide* under the Building Act. The only proceeding of theirs which was according to the provisions of the Building Act, was the notice, and this they abandoned by beginning to pull down the adjoining house and party-wall before the expiration of the notice. The assent of the son does not affect the tenant, unless it be shewn that he had authority from her to assent. The Company having departed from the provisions of the Building Act, the occupier cannot recover under that act; and as damage has been sustained by her, she ought to have some mode of recovering compensation for it. The complainant relies on the 66th section, which enacts, that for preserving uniformity in the erections and buildings thereby authorized to be erected, such erections and build-

ings shall not be subject to the Building Act. [*Parke, J.* The 66th section does not appear to me to have anything to do with the question. It applies only to new buildings.] The house adjoining is a new building. Then the 68th section gives compensation for any damage sustained by reason of the pulling down of any messuage, &c., to be taken down for the purposes of this act. [*Taunton, J.* The act refers only to a pulling down in execution of the powers of the act.] It was in execution of the powers of the act that No. 22 was bought and pulled down. Every thing was done "for the purposes of or otherwise in execution of the act." [*Parke, J.* For what do you claim compensation?] Because the wall was taken down in an improper manner, so that dust, bricks, &c., came into the complainant's house, and because the Company began to pull down too soon after the notice, so that there was no time to prepare. [*Parke, J.* But for the defect in the party-wall, the Company would not have pulled it down, and this was done under the Building Act. Supposing there had been no Building Act, would the Company have been empowered? This is the right way of trying whether the wall was pulled down in execution of the powers of the Hungerford Market Act.] It is apprehended that they might have taken it down if it was dangerous to leave it; but, even supposing they had left the party-wall, the complainant would still have sustained some damage. All, however, that they have done, was done in conformity with their act, in order that they might build another house uniform with the remainder of the street, in the place of that which they pulled down. [*Patteson, J.* Is it clear that they have not complied with the requisitions of the Building Act?] They began, but did not continue to act under that statute. [*Denman, C. J.* I do not see how, upon these affidavits, we can inquire whether the Company have proceeded regularly under the Building Act.] The question is, whether the Company pulled down the wall in execution of the powers of their

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act. [Parke, J. It strikes me at present, that, had it not been for the Building Act, the Company would never have meddled with the party-wall. I do not say how much this opinion may be altered by subsequent observations.] The affidavits state that the injury arose from pulling down the house and the party-wall conjointly.

By the 66th section of the Hungerford Market Act, the Building Act is repealed so far as the Company's new erections are concerned. Mrs. Yeates could not have enforced the provisions of the Building Act against the Company. It would therefore be an unreasonable construction of the act of parliament, to hold that the Company could enforce these provisions against her; *Rex v. Pease* (a). This would be a fair mode of reasoning even if it were applied to a public act. But the Hungerford Market Act is a private act incorporating a public Company, and therefore to be construed, (if at all ambiguous,) against the Company and in favour of private property, *Scales v. Pickering* (b). Pursuing this mode of construction, the Building Act must be considered as entirely repealed quoad hoc by the provisions of the 66th section, and a party-wall will be a "building" within the meaning of the 68th section.

DENMAN, C. J.—Before we make such a rule as this absolute, we must be satisfied that there is a legal power to put the jury in motion. Upon looking at the act I see none. Upon a consideration of the 66th section, I think that the object for which it was framed was to preserve the uniformity of the buildings, and that it was not intended to interfere with the necessity of having a good party-wall. The Company here buy a house, and in pulling it down find that there is a bad party-wall between that house and the one adjoining. Then they do, as any other purchaser would do—enforce the provisions of the Building Act. I do

(a) 4 Barn. & Adol. 30. (b) 4 Bingh. 448; 1 Moore & Payne, 195.

not think that it is for us now to inquire into the regularity of their proceedings under that act. Every act of every description done by the Company is in a certain sense done for the purpose of carrying into execution the Hungerford Market Act, and I think it would be extending the meaning of the 68th section to an enormous length if it were to be held that any wrongful act whatever done by them would bring them within its provisions. As to the question whether, in this particular matter, they acted by virtue of this act, I cannot say that they did so. I only see that they have done as any other party might have done, that is, they have exercised the powers given by the Building Act. If, on the other hand, they have not acted regularly, so as to bring themselves within the provisions of the Building Act, for having acted contrary to the provisions of that statute they are liable. But still that does not make the pulling down the wall an act done under the Hungerford Market Act.

PARKE, J.—I am of opinion that there should be no mandamus. The complainant alleges several injuries which she has sustained, but it is not said whether they were owing to the party-wall or to the house being taken down. So far as respects the pulling down of the adjoining house, she would be entitled to compensation; but it does not sufficiently appear upon the affidavits that she has sustained distinct damage from that cause. Then comes the question, whether she is entitled to compensation for the injury sustained owing to the pulling down of the party-wall. I think that if the Building Act had not existed, the Company would not have pulled down the party-wall, and that the wall was pulled down under that act. That produces another question, whether the Building Act is repealed with respect to this party-wall. It has been argued with considerable ability by Mr. Stammers, that the 66th section does apply to this case. I think, however, that it was not intended that that section should have such an operation, but that the object of introducing that section was to secure

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a uniformity in the buildings. It enables the Company to build the houses as they think most proper, and they may separate their own houses by any species of division; but, with respect to the separation between their new buildings and the old ones, there is nothing to withdraw it from the operation of the Building Act. Under the Building Act, the Company was bound to proceed to pull down this wall. Therefore, I think it cannot be said that they did so under or by virtue of the powers contained in the Hungerford Market Act.

TAUNTON, J.—I am of opinion, for the reasons stated by my lord and my brother *Purke*, that the present case is not within the 66th section. It therefore may be laid out of consideration; and the question comes to this, whether the messuage or building of *Mrs. Yeates* has been “damaged or injured by or in the taking down of any of the messuages or buildings to be taken down for the purposes of, or otherwise in the execution of this act.” Certainly, every thing done by this Company may, if properly done, be said to be done to some intent for the purpose of or in execution of this act. Here, however, the question is, not whether the act complained of was done generally for the purposes of or in execution of the statute, but whether it was done *under the powers* which that statute conferred upon the Company. Upon looking at the statute and at the affidavits, I see no reason whatever to doubt that the rebuilding of the party-wall was not an act intended to be done under this act, but that it was intended to be done under the provisions of the Building Act. So it was understood between the parties. With regard to the son’s acquiescence, without examining whether he was the general agent of the complainant, yet considering that the surveyor was appointed, there cannot be a doubt that the complainant understood that the Company intended to act under the provisions of the Building Act. The damage was done under that act and not under the Hungerford Market Act. There-

fore I think that *Mrs. Yeates* has not established her title to claim compensation.

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PATTESON, J.—I am entirely of the same opinion, for the reasons which have been already given. I would only add, that, with regard to any imputation cast upon the Company of their having acted oppressively, I think there is no ground for it. Nothing more has been done by them than is usually done (*a*), and ought to be done under the provisions of the Building Act by any other purchaser.

Rule discharged, without costs.

(a) *Vide Collins v. Poney*, 9 East, 322.

#### The KING v. The Inhabitants of SLAITHWAITE.

UPON an appeal against an order of two justices, whereby *Ann Beaumont* was removed from the township of Duck-infield, in the county of Chester, to the parish of Slaithwaite, in the county of York, the Court of Quarter Sessions confirmed the order, subject to the opinion of this Court on the following case:

The pauper was the grand-daughter of *Joshua Beaumont*, and in order to prove a derivative settlement from him in the appellat township, a document was produced by one of the overseers of the poor of the township of Marsden, acknowledging the grandfather's settlement to be in the appellat township. This document was objected to by the counsel for the appellat township, as it did not contain the requisite allowance of two justices. No parol evidence was given to shew that the document ever contained the allowance of two justices. The Court of Quarter Sessions confirmed the order, being of opinion that the document, which was fifty-nine years old, had once been in a perfect state, and had contained the allowance of two justices. The word "sworn" is prefixed to the name of one

An old certificate, by which the parish of A. acknowledges to the parish of B. that a person is settled in A. produced by the overseers of B. on the trial of an appeal between A. and C., may be presumed to have been originally a perfect instrument, though the allowance of two justices does not now appear upon it.

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of the attesting witnesses. The letter W. (the first letter of an allowance by justices in the usual form) appears at the bottom of the paper, the lower part of the letter being torn off.

*Lloyd and Townshend*, in support of the order of sessions. This seems to be purely a question of fact, which the sessions were at liberty to decide. They did decide that the document produced was originally a perfect instrument; and this case is sent hither for the purpose of trying whether they had a right to draw this conclusion. The Court will intend that to this instrument, fifty-nine years ago, another piece of paper was attached, and that the certificate was originally perfect; *Rex v. Catesby* (a).

*Blackburn and Cottingham*, contra. Undoubtedly this was a question of fact, but to be decided upon evidence; and in this case there was not sufficient evidence to make out the fact that this was ever a perfect instrument, so as to entitle the respondents to say that the pauper was settled in the appellants parish. It is true that the Court will make an intendment, as in the case which has been cited; but here the intendment which the Court is called upon to make, is, not that every thing which ought to attend the execution of such an instrument was correctly done, in a case where the instrument produced is perfect in itself, but this is an intendment to *construct* an instrument. Besides, this document did not come out of the proper custody. It only appears that it came from the township of Marsden, without any parol evidence of its having ever been acted upon.

By the COURT.—There can be no doubt that, looking at this document, it is good. It was evidently drawn up originally in the usual manner. This was a question of fact for the sessions to decide upon, and they were perfectly warranted in making this presumption, as well from the

(a) 4 Dowl. & Ry. 434; 2 Barn. & Cressw. 814.

appearance of the document itself, as from the custody, that the document was originally perfect. There was evidence therefore of the settlement of *Beaumont* in *Braithwaite*, and consequently of a derivative settlement of the pauper in that parish.

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Order of Sessions confirmed.

The KING v. DAVIS.

THE following order was made on the 22d May, 1832, at Cheltenham, by three justices for the county of Gloucester.

Whereas *James Davis*, of &c. on the 15th day of May, 1832, at Cheltenham, in the county of Gloucester, upon a complaint in writing, duly made and exhibited before *R. B. C.* and *T. N.* Esquires, two of his majesty's justices of the peace for the said county of Gloucester, residing near the place whence the goods and chattels hereinafter mentioned were removed, and not being interested in the premises whence the same had been removed, was charged with having fraudulently and clandestinely removed and conveyed away his goods and chattels, not exceeding the value of 50*l.*, from certain premises at Cheltenham aforesaid, to prevent *William Gyde* from distraining the said goods and chattels for arrears of rent due to the said *W. G.* for the said premises; And whereas the said *John Davis*, of &c., was on the day and year aforesaid, in the county aforesaid, upon the said complaint duly made, charged before the said *R. B. C.* and *T. N.* with having wilfully and knowingly aided and assisted the said *James Davis* in so fraudulently and clandestinely removing and conveying away the said goods and chattels, and in concealing the same; and the said *R. B. C.* and *T. N.* as such justices, having summoned the parties concerned, and we the said *R. B. C.* and *T. N.*, together with *J. E. V.* Esquire, also one of his

In an order of conviction under 11 *Geo. 2*, c. 19, for fraudulently and clandestinely removing goods to prevent a distress, it must distinctly appear that the complainant is the landlord, or the agent, bailiff or servant of the landlord, and that the party removing is tenant.

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majesty's justices, having heard ~~the said~~ charge and examined the fact, and all proper witnesses upon oath, and it appearing and being fully proved before us, that the said *James Davis* did so fraudulently and clandestinely remove and convey away the said goods and chattels as aforesaid, being of the value of a sum under 50*l.*; And it also appearing and being fully proved before us, that the said *John Davis* wilfully and knowingly aided and assisted the said *James Davis* in so removing and conveying away the said goods and chattels as aforesaid, and in concealing the same: We the said three justices, being respectively justices of the peace, residing near the place whence the said goods and chattels were removed, and neither of us being interested in the premises whence the same were so removed as aforesaid, do thereupon, this 22d day of May, in the year aforesaid, at the parish of Cheltenham aforesaid, in the county aforesaid, determine and adjudge that the said *James Davis* and *John Davis* are guilty of the offences with which they are charged as aforesaid, and they are hereby convicted hereof. And we do hereby order and adjudge them to pay the sum of 34*l.*, being double the value of the said goods and chattels, to the said *W. G.* forthwith. Given under our hands and seals at Cheltenham aforesaid, in the county aforesaid, the 22d day of May, A.D. 1832.

This order was appealed against by *John Davis*; and upon the trial of the appeal at the Gloucestershire Trinity Sessions, 1832, the Court of Quarter Sessions confirmed the order, and refused to grant a case. In Michaelmas term, 1832, an application was made on the behalf of *John Davis* to remove the order of these justices and the order of sessions into this Court, which was granted. In last Hilary term *Steer* obtained a rule nisi on the behalf of *John Davis*, calling upon the prosecutors to shew cause why the orders should not be quashed for insufficiency; against which,

*Sir J. Scarlett* and *Justice* now shewed cause. Some objections "which are good against a conviction cannot

prevail against an order, which this has been held to be; *Rex v. Bissex* (a). This order pursues the form given in *Burn's Justice* (b), which in the case of *Rex v. Rabbits* (c) is pronounced by *Bayley, J.* to be unobjectionable. In answer to the objection which was intended to be made to this, it may be said, first, that it is not necessary that the informer should be named. He is not named in *Rex v. Rabbits*. [*Parke, J.* The form in *Rex v. Rabbits* does not follow the form in *Burn's Justice*, for it does not state the parties to be landlord and tenant.] And, secondly, that it is stated that upon complaint *duly* made, the parties were charged. This is sufficient under the act of parliament; for in favour of orders of justices *omnia præsumuntur rite esse acta* (d); as in the case of *Rex v. Bissex*.

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It is said that it does not appear that *W. G.* was the landlord; but it is alleged that the removal of the goods from the premises was "to prevent *W. G.* from distraining the said goods and chattels for arrears of rent due to the said *W. G.* for the said premises." This shews that *W. G.* was *James Davis's* landlord. Second point.

The next objection is, that *James Davis* does not appear to be the tenant of *W. G.* The general words which are found in the order lead to the inference that he was tenant to *W. G.*; and this being an order of justices, and not a conviction, the Court will draw that inference if they can. The act applies only to tenants and lessees (e). It would not be fraudulent if a creditor removed. Therefore, as it is said in the order, that *James Davis* fraudulently and clandestinely removed and conveyed away the goods, this, coupled with the other words which have been relied on as shewing that *W. G.* was landlord, (the whole being construed favourably according to *Rex v. Bissex* and the text writers who have followed it,) is sufficient to make it appear upon the face of the order Third point.

(a) 1 *Burn's Justice*, 24th edition, *Distress*, page 876, et seqq.

(b) *Ib.* 902.

(c) 6 *Dowl. & Ryl.* 344.

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(d) As to this maxim, see 12 *Vin. Abr. Evidence*, 124, 125, 246; 13 *Vin. Abr. Fairs*, 99.

(e) 11 *Geo. 2, c. 19, s. 3.*

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that *James Davis* was tenant to *W. G.* In *Rex v. Bissar*, the case of *Rex v. Monk* was cited by *Dennison, J.* as a decision, from which it might be inferred, that it was not necessary to state in the case before him that *J. N.* did carry off his goods and chattels; which shews in how favourable a light that judge thought such an order ought to be viewed. The answers to all the other objections in that case shew that the intendment will be in favour of the justices having acted rightly. As it was open to the parties upon the appeal to object that *W. G.* was not landlord, or *James Davis* not tenant, their not having done so strengthens any presumption arising upon the order in favour of the jurisdiction of the justices. Nothing appears upon the order which can raise an adverse intendment, and therefore the case falls within the general rule, that the Court will supply by intendment that which is necessary to make the order strictly formal; *Paley on Convictions (a)*. [*Taunton, J.* It must appear upon the face of the order that the justices have jurisdiction. Where a servant was discharged from the service of his master, and an order was made touching such discharge by two justices under the statute of *Elizabeth*, the order was held not good, because it did not allege that the service was a service in husbandry.]

Fourth point.

As to the objection, that the time at which the removal took place is not sufficiently stated, such statement is not necessary. The time is not mentioned in *Rex v. Rabbits*.

*Thesiger*, contra, was stopped by the Court.

DENMAN, C. J.—With regard to the first objection, it is, perhaps, enough to say, that the words “duly charged” are a sufficient answer. With respect to the second and third objections, which go to the jurisdiction of the justices, it seems to me that those objections are well founded, and that the justices had no jurisdiction; for they have no power, unless when the one party is landlord and the other tenant.

(a) Vol. ii. 69, second edition; and see *ibid.* 128.

It is quite consistent with all that appears, that *W. G.* was not landlord, and that *James Davis* was not tenant. This objection did not occur either in *Rex v. Rabbits* or in *Rex v. Bitter*.

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PARKE, J.—There are four objections; but it is enough to say that the objection, that it does not appear that *Davis* was tenant, is fatal to the order. The justices have only a special authority, in case of a complaint from the landlord, bailiff, servant, or agent, that the tenant has fraudulently removed his goods to prevent a distress; unless therefore it appear that the complainant is landlord, bailiff, servant, or agent, and that the party removing is tenant, the justices have no jurisdiction. It is unfortunate that the justices have followed a form which is so full of imperfections.

TAUNTON, J., concurred.

PATTERSON, J.—I am of the same opinion. I wish it not to go forth that the second objection is not tenable. All that is said is, that rent is due to *W. G.* He may have been the superior landlord of *Davis*.

PARKE, J., concurred in this.

Rule absolute.

#### The KING v. The Inhabitants of STOCKTON.

BY an order of justices *Frances*, the wife of *Robert Carstorf*, and her three children, were removed from the township of Stockton, in the county of Durham, to the parish of Spalding, in the county of Lincoln. Upon appeal, the Court of Quarter Sessions quashed the order, subject to the opinion of this Court upon the following case:—

The Court will not presume a fact by which an order of removal would be vitiated.

Where an order is silent as to the existence or non-existence of a fact necessary

to support the order, the Court will presume in favour of its existence.

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On the 2d May last *Robert Carstorfen*, who is a native of Scotland without settlement in England, and a lunatic, returned from Sunderland, in Durham, where he had for some time been residing, to Stockton, accompanied by his wife and three children. Almost immediately on their arrival in that township, they applied to the assistant overseer for relief, and on the 2d and 3d of that month they were relieved by him with one shilling each time, and ordered to quit the town and return to Sunderland. About the 19th of May the wife applied to the Stockton overseers for relief, whereupon she and her three children were removed to Spalding by an order, which stated, that upon complaint of the churchwardens, &c. of the township of Stockton to two justices, that *Frances*, the wife of *Robert Carstorfen*, a Scotchman, having no settlement in England, and who is a lunatic, and her three children, had come to inhabit in Stockton, not having gained a settlement there, or produced any certificate, and that they had become chargeable to the said township of Stockton; they, the said justices, upon due proof, &c. did adjudge the same to be true, and did likewise adjudge that the lawful settlement of her, the said *Frances Carstorfen*, and her three children, was in the said parish of Spalding, and did therefore require the overseers of Stockton to convey the said *Frances Carstorfen* and her three children from and out of Stockton to the parish of Spalding, &c.

Spalding appealed against this order; and to bring the question before the Court the following admissions were entered into:

That the maiden settlement of *Frances Carstorfen*, the pauper, was in the parish of Spalding; that she was legally married to *Robert Carstorfen*; that the three children named in the order are the legitimate children of *Frances Carstorfen* by *Robert Carstorfen*; that *Robert Carstorfen* was born in Scotland; that he has not gained any settlement in England; and that he was living and a lunatic at the date of the order of removal.

The appeal came on for hearing at the October Sessions, when an objection was taken to the form of the order; and the Court quashed the order on the ground that it was bad on the face of it, as it did not contain any statement of the desertion of the wife by the husband, and that the defect was in matter of substance which the Court had not the power to remedy, and that evidence could not be received for the purpose of amending the order. The township of Stockton tendered evidence for this purpose, and offered to show that the husband was not living with his wife, or in Stockton, at the time of her application for relief, on of the order of removal, but that he had escaped from his family, in a fit of lunacy on the preceding 4th of May, when they were all in Yorkshire.

If the Court shall be of opinion that the order was bad on the face of it, and not amendable, the order of sessions is to be confirmed, otherwise it is to be quashed.

*Ingham*, in support of the order of sessions. The alteration attempted to be made was matter of substance, and therefore the Court of Quarter Sessions had no authority to make it; *Rex v. Great Bedwin* (a). It should have appeared on the face of the order, that the act of the magistrates did not compulsorily separate the husband from the wife. To render the order valid, one of these three circumstances should have appeared; either that the husband expressly consented to the making of the order, or that the place to which the wife was removed was the husband's settlement, or that the husband had deserted the wife. In *Rex v. Iron-Acton* (b), the removal was to the husband's settlement; so in *Rex v. Higher Walton* (c). In *Rex v. St. Michael's, Bath* (d), the presumption was, that the wife was removed to the settlement of her husband.

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(a) Burr. S. C. 163. And see *Rex v. Chilvers Cotton*, 8 T. R. 178.  
(b) Burr. S. C. 153.

(c) Burr. S. C. 162.  
(d) 2 Dougl. 630; Cald. 110.

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There are cases in which the wife has been removed to her maiden settlement; but by 50 Geo. 3, c. 19 (a), as the husband was a Scotchman, he and his wife should have been passed to Scotland, *Rex v. Leeds* (b). In *Rex v. Ellham* (c), it appeared that the husband consented to the removal. In *Rex v. Cottingham* (d), the husband had deserted the wife.

*S. Temple, contra.* The cases cited have decided that the Court will not presume a fact not stated in the order of removal, which will have the effect of vitiating such order. The husband and wife, if resident, ought to be removed together, and if he be a Scotchman without a settlement, they ought to be removed to Scotland; but if the wife be alone and the husband not within the control of the parish officers, she may be removed to the place of her maiden settlement. Now this order is in these words:—"Whereas, upon complaint, &c. that *Frances Carstorfes*, the wife of *Robert Carstorfes*, (a Scotchman having no settlement in England, and who is a lunatic,) together with her three children, have come to inhabit in the township of Stockton." Here there is no statement on the face of the order, that *Frances*, and *Robert* her husband, have come to inhabit. If, then, it be the law that unless the husband is residing with the wife, she must be removed alone to her place of maiden settlement, the Court cannot vacate this order without presuming, not only that *Frances* had gone to inhabit, but that her husband had gone with her. In *Rex v. Higher Walton*, *Rex v. Iron-Acton*, and *St. Michael's, Bath, v. Nanny* (e), it was not stated where the husband was, and it was said that nothing ought to be intended to vitiate the order, and that therefore it could not be intended that the husband was not at the place to which the wife had been removed. [*Parker, J.* Ought we even to presume that the husband was not at Spalding?] Certainly not.

(a) Sect. 55.

(d) 11 Maunt. &amp; Ryf. 489; 7

(b) 4 Barn. &amp; Alders. 468. Barn. &amp; Cresswell 615.

(c) 5 East, 113.

(e) 1 Stra. 544; Burr. S.C. 815.

DENMAN, C. J.—I certainly agree with what Mr. *Temple* has said, that the Court will not presume anything which will vitiate an order of removal.

PARKE, J.—This case falls precisely within the principle laid down in *St. Michael's, Bath, v. Nunny*; as that case is reported in *Strange*. We cannot intend that the husband came to reside at Stockton, or that he was not at Spalding at the time of the removal.

TAUNTON, J. and PATTESON, J. concurred.

Order of Sessions quashed.

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The KING v. The Inhabitants of ST. MARY, NEWINGTON.

UPON appeal, an order of justices, by which *Edwin James Sanders*, his wife and child, were removed from St. Mary, Newington, in the county of Surrey, to St. Mary, Islington, in the county of Middlesex, was quashed, subject to the opinion of this Court on the following case :

In October, 1818, the pauper's father being settled in St. Mary, Islington, entered into an engagement with *J. B.* rector of St. Nicholas Cole Abbey, Old Fish Street, London, to officiate as curate of that parish, and to have 80*l.* per annum and the rectory house to reside in free of rent and taxes, and commenced his duties as curate. On the 12th December following, he was nominated and appointed by the rector, *J. B.*, to be curate of that parish, but did not reside at the rectory house until a week after Christmas, 1818. On the 2d February, 1819, a licence was granted to him by the Bishop of London, pursuant to the provisions of 57 Geo. 3, c. 99, to perform the office of stipendiary curate in the parish of St. Nicholas Cole Abbey, in which were the

To gain a settlement under 13 & 14 Car. 2, c. 12, by coming to settle in a tenement, it is not necessary that the party occupy as tenant.

Before 59 Geo. 3, c. 50, a curate therefore gained a settlement by residing 40 days in the rectory house under an agreement, by which such residence was to form part of his remuneration, and with the licence of the bishop, under 57 Geo. 3, c. 99.

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following words: "And we do, by these presents assign unto you the yearly stipend of eighty pounds, to be paid quarterly, for serving the said cure, with the rectory house wherein we direct you to reside, and offices, free of rent, repairs and taxes." The pauper's father performed all the duties of curate from October, 1818, until his death; resided at the rectory house, which is a separate and distinct dwelling-house, worth, free of rent and taxes, more than 10*l.* a-year, and received the yearly stipend.

The question for the opinion of the Court is, whether the pauper's father, by occupying the rectory house in the manner stated, gained a settlement in the parish of St. Nicholas Cole Abbey, Old Fish Street, London.

*Barnewall* in support of the order of sessions. It is material to observe the dates. The father went to reside in the rectory house a week after Christmas, 1818, and the act of 59 *Geo.* 3, c. 50, did not pass until the 2d July, 1819: He therefore resided in the rectory house six or seven months before that act passed, and thus gained a settlement under 14 and 15 *Car.* 2, by occupying for more than 40 days a house of greater annual value than 10*l.*, and this although he was exempt from the payment of rent; 2 *Nolan's* P. L. p. 4. Here, however, he can hardly be said to have been exempt from the payment of rent, inasmuch as he would have received proportionably more for his services as curate if he had not been allowed to occupy the rectory house. It will be argued upon the 57th *Geo.* 3, c. 99, that the curate had no interest as tenant, until after the licence was granted. What was the interest? That of course would depend upon the agreement. In this case it was a tenancy from year to year, defeasible upon the death of the rector. The interest which the curate has after licence obtained is very strong. The 67th section of the act provides, that even the rector himself shall not dispossess the curate or take possession of the parsonage-house which shall have been assigned to the curate, with-

out a licence in writing from the bishop, and three months notice to the curate. The residence at the rectory house for more than 40 days after the licence had been obtained, also gained a settlement after licence.

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*Thesiger* and *Tidd Pratt* contra. No settlement was gained by residence for 40 days. The residence before the licence might have gained a settlement if it had continued for 40 days, but a residence after licence would have reference to the duty of the party as curate, and was so connected with the cure that no settlement could be gained by it. The residence before licence continued for 80 days only, and therefore is quite out of the case. In *Rex v. Wantage (a)*, where the question was discussed, and decided in the negative, whether a curate gained a settlement by serving the office of licensed curate of the parish, he having resided there during the six years for which he performed the duties of that office, it was not even suggested that a settlement could be gained by residence in the parsonage house. [*Denman*, C. J. It does not appear that the house was worth 10*l.* a year.] It does not appear, but that may be presumed. It is quite clear that unless a person comes to reside in a parish in the character of a *tenant*, no settlement is gained by occupation. Here, the pauper's father does not come to settle in the house, taking the interest of a tenant, but he comes to reside under a licence as curate, which is quite different. By the 64th section of 57 *Geo. 3*, c. 99, it is enacted, "that it shall be lawful for the bishop, who shall grant any licence to any curate to serve any church or chapel where the rector or vicar or person holding any benefice is not resident for four months in each year, to allot, if he shall think fit, for the residence of such curate, the parsonage or vicarage house, or usual house of residence of the person holding the benefice, with the offices, stables, gardens, and appurtenances thereto be-

(a) 2 East, 66.



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long series of cases, any person who comes to reside in a parish, and occupies in it a tenement of the value of 10*l.* a year, by such occupation gains a settlement. The word "tenant" does not occur in the act of parliament. It is often convenient to see whether a party occupies as tenant, because that shews that the occupier is independent; and it is for this purpose that the cases which have dwelt upon a renting have done so. In this case a settlement was clearly gained.

PARKE, J.—I am by no means quite satisfied that in this case the curate is not the *tenant* of the rector; but I do not think it necessary, that for the purpose of gaining a settlement by occupation, the occupier should be tenant.

TAUNTON, J.—A settlement was gained under 13 and 14 *Car.* 2, I apprehend it is not necessary that there should be a contract of *hiring* or *renting*; and that it is sufficient if the party comes to settle on a tenement of the yearly value of 10*l.* It is said in *Nolan* (a), that lawful possession of a tenement of sufficient value, when absolute and independent, with some interest that is sufficiently permanent to denote a *coming to settle*, according to the words of 13 and 14 *Car.* 2, confers a settlement, although the occupier be exempt from the payment of rent. The possession here was absolute during the time it continued, and was sufficiently permanent, although it might be defeasible upon the bishop's revoking his licence. I therefore think that a settlement was gained by the pauper's father in St. Mary, Newington.

PATTESON, J.—I am of the same opinion. The curate gained a settlement by the occupation, unless it was an occupation of the rector by his curate; and I cannot say that I think it was.

Order of Sessions confirmed.

(a) 2 Nol. 4, third edition.

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The KING v. WILLIAM MORTON PITT, Esq.

UPON appeal against a poor-rate for the township of Kyo, in the county of Durham, made the 4th of April, 1832, by which the appellant was assessed in the sum of 12*l.* 10*s.* for coal mines, the Court of Quarter Sessions, with the consent of the parties, confirmed the rate, subject to the opinion of this Court upon the following case;—

By an act 40 *Geo.* 3, intituled “An Act for dividing, allotting and inclosing a common called Tanfield Moor, in the parish of Chester-le-Street, in the county of Durham,” after reciting that the Marquesses of Bate and Hertford, and the Earl of Windsor, were entitled to the soil of the said common, and to the quarries of stone and all other mines and minerals (except the coal-mines and seams of coal), within and under the same, as tenants in common, and that the appellant was entitled to the collieries and coal-mines, and seams of coal as well opened as not opened, being within and under the said common, together with certain liberties in and over the same, for winning, working, managing and carrying on the said collieries, and for *leading* and carrying away the coals; and that certain persons therein named, and several other persons, as owners of messuages, lands, tenements and hereditaments, were entitled to right of common upon the said common; it was enacted, that the commissioners should allot unto the said Marquesses and Earl one full sixteenth part in value of the said common, as a compensation for their right to the soil thereof, and for their consent to the inclosure thereof, which sixteenth part should be deemed to be within the township of Tanfield; and after the said sixteenth part should have been so allotted, the commissioners should allot the remainder of the said common amongst the several persons having right of common upon the same, in proportion to the rents or value of their respective messuages or tenements, in respect whereof they were

An act for inclosing a common, which directs that the allotment to the commoners shall be deemed to be within the township wherein the lands of such commoners lie, does not alter the right or liabilities of the owners of coal-mines, either worked or unworked, under such allotment.

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severally entitled thereto as aforesaid, in the proportions therein mentioned. And it was thereby declared, that, all the allotments to be set out to the several persons having right of common upon the said common *should be deemed to be situate within the same townships and places respectively wherein the lands lie in respect of which such allotments should be made.* And it was also enacted, that all such lands as should, by virtue of that act, be allotted for or in right of messuages or tenements, should be held in the same manner, and should be of the same nature and tenure as the respective messuages or tenements in regard or in respect of which such allotments were made; and also, that nothing therein contained should be construed to defeat, lessen, prejudice or *affect* the right, title or interest of the appellant, his heirs or assigns, of, in, and to the coal-mines and seams of coal, as well opened as not opened, under the said common, but that the appellant, his heirs and assigns, should and might, from time to time and at all times thereafter, have, hold, work and enjoy the coal-mines and seams of coal, as well opened as not opened, lying and being under the said common, and also full liberty, power and authority to make, erect, use and enjoy, in, upon, within and under the said common, or any part thereof, all and every necessary and convenient works, buildings, erections, liberties, powers and authorities either then in use, or thereafter to be invented, for the winning, working, managing and carrying on the said coal-mines and seams of coal; and also that the appellant, his executors, administrators and assigns, should and might, from time to time, and at all times thereafter during the then residue of a certain term of 500 years granted and devised in and by a certain indenture bearing date 26th April, 1781, made between Dame Jane Clavering of the one part, and George Pitt, Esquire, of the other part, have, hold, use and enjoy, upon the terms and conditions, and under the *tentative rents* (a) in that indenture mentioned, the waggon-way and waggon-ways, strings, slips and branches then laid and

(a) i. e. rents proportioned to the quantity dug.

used for the leading and carrying away the coals of the said coal-mines and seams of coal, with full liberty from time to time to repair the same respectively; and also all other powers, liberties and authorities in and by the said indenture granted, of making, laying, placing and repairing any new or other waggon-ways, strings, slips or branches, bridges, inounts or batteries, in, through, over or upon the said common, or any part thereof, in as ample and beneficial manner and form as the appellant, his heirs, executors, administrators or assigns, or any of them, might or could have done, if the said act had not been made, without paying any damages or satisfaction, or compensation for spoil of ground, to be occasioned by the use or enjoyment of the said liberties, powers and authorities, or any of them, pursuant to the said act.

The common was inclosed, divided and allotted at the time of the passing of the act. The whole of the common was situate within the chapelry of Tanfield. The lands in respect of which allotments were set out, are of various tenures, freehold, copyhold and leasehold, and several of such lands are situate within the township of Kyo; and other adjoining townships; and by the clause in the act before stated, such allotments became and now form part of the respective townships in which such lands or estates in respect of which such allotments were set out, are so situated; and are of the same nature and tenure as such lands or estates are respectively holden. Previously to and for some time after the said division, the coal under the whole of the said common was rated to the relief of the poor of the chapelry of Tanfield; but some time ago the coal under the allotments set out in respect of the estates in Kyo; and in another adjoining township, was rated to the poor for those townships.

The question as to the legal propriety of thus rating the mines is of considerable importance to the townships interested, and in order to have it set at rest, Mr. Pitt has appealed against this rate. The coal-mines for which the

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appellant was assessed, are within and under allotments of the said common allotted in respect of lands situate within the township of Kyo.

*F. N. Rogers*, (with whom was *Hudley*;) in support of the order of sessions. The clause upon which the whole question turns is that by which it is enacted, "that all allotments to be set out to the several persons having right of common upon the said common, shall be deemed to be situate within the townships and places respectively wherein the lands lie in respect of which such allotments shall be made." The question is, whether the words are sufficient to carry the whole of the soil into the parish to which the allotment is made; and admitting that to be so, whether there is any thing in the act to contravene the effect of these words, so far as the coal mines are concerned. The words "all the allotments shall be deemed to be within, &c." carry the whole soil into the township of Kyo, in express terms. Perhaps it will be contended that the surface passes and not the sub-soil. *Lewis v. Braithwaite*(a) appears to decide that question. That was an action of trespass brought by a copyholder for injury done to the sub-soil, and it was questioned whether a copyholder could recover except for an injury done to the surface. The Court decided that he might; as well as a freeholder. *Littledale*, J. in his judgment observed, "it is not disputed that a freeholder, or one holding under him for life, for years, or at will, has possession of the soil from the surface to the centre of the earth;" and Lord *Tenterden* said, "the general rule being, that he who has the surface has the sub-soil, it seems to me that a copyholder has possession of the sub-soil, although he may have no property in it." [*Taunton*, J. "These allotments are to follow the nature and quality of the right of the commoners. That will not give them the soil."] In *Townley v. Gibson*(b), by an act passed for enclosing the wastes of a

(a) 2 Barn. & Adol. 437.

(b) 2 T. R. 701.

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manor, a certain portion was to be allotted to the lady of the manor as a compensation for her right and interest in and to the soil of the residue of the waste ground, and the remainder was to be allotted to the commoners in fee-simple, free from all customary tenures, rents, fines, boons and services whatsoever, with a reservation to the lady, her heirs &c. of all seigniories incident to the manor, and all rents, fines, services, &c. and all other royalties and manorial jurisdiction whatsoever. It was held that messuages under those allotments to the tenant were not reserved by the clause. [*Parke, J.* There the lord received an allotment in right of his title to the soil. *Taunton, J.* In that case was there no express reservation, such as this, of all the appellant's right, title and interest?] This is a provision to protect the appellant's interest in the coal from being allotted, but it will not go further. [*Denman, C. J.* Here, the coal is not allotted to the commoners, nor is any allotment whatever made to Mr. Pitt, the appellant. *Parke, J.* In *Taunley v. Gibson*, the lord received an allotment in respect of his interest in the soil, and it was held that a reservation of the seigniorie, after a direction to allot the waste to the commoners in fee, did not reserve the coal mines. All that goes to the township is that which is allotted to the commoners.] In other cases, where the word 'allotment' is used, it carries all the soil. Here, the reservation is only of the coal and nothing more. The exception in favour of the appellant is to preserve his private right, and cannot be extended further. All the soil besides the coal remains to the commoners, to whom allotments have been made. There is nothing to prevent the common law effect of the words. [*Taunton, J.* The right of the appellant may be very materially affected by transferring the coal from one parish to another, for there may be a great difference in the value of the two parishes.] The general words pass the whole soil, including the coal, and the reservation only preserves to the appellant his right to the coal, and the power of exercising that right. [*Parke, J.*

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Then the coal does not pass. Looking at the whole of the act, it is quite clear that nothing was transferred to the parish but the surface.] The antecedent rights of the parties are divested by the words directing the commissioners to make the allotment. [*Parke, J.* The change of locality takes place upon the commissioners making their award, and not from the passing of the act. As the commissioners have allotted only the surface, the locality of the surface alone is charged.]

*Sir J. Scarlett and Cresswell, contra*, were stopped by the Court.

DENMAN, C. J.—This is a curious enactment. The allotments transferred from the township to the several parishes, are those allotments which are set out to the persons having rights of common. It does not appear that the appellant had any right of common, nor is there any allotment made to him. And moreover, there appears an express exception of the appellant's right to the coals out of the power of the commissioners. It is quite clear that this enactment cannot have any operation upon the coal, as contended for.

PARKE, J.—I am of the same opinion. Before the passing of this act, all the soil was in Tanfield. By this act, some part of the surface, or soil, is taken out of that township, and transferred to other townships and parishes. The act says, that all the allotments to be set out to the several persons having right of common, shall be deemed to be situate in the same townships and places respectively wherein the lands lie in respect of which the allotments shall be made. Whatever is allotted to commoners, is taken out of the township of Tanfield. The coal is not allotted, and therefore remains in the same township.

TAUNTON, J.—The whole substance of the provision is, that the allotments given in substitution for the right of

common, shall be of the same nature and quality, and have the same local situation, as the land out of which the right of common was derived. The right of the appellant is reserved to him. I do not see the smallest shadow of a doubt but that the coals are ratable in the same place as before the inclosure. It seems that this was the construction put upon the act in the first instance, and this first construction was right.

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PATTESON, J.—I quite agree to the general doctrine, that the owner of the surface is the owner of the soil. The question is, here, what is the meaning of “allotment.” The act changes the locality of “the allotments to be set out to the several persons having rights of common.” What is allotted? Not the appellant’s coal mines, for they are reserved to him. It is quite clear the coal is still in the township of Tanfield.

Order of Sessions quashed (a).

(a) See an ejectment for coal mines in this parish, *Commyn v. Kincto*, Cro. Jac. 150.

As to separate inheritances in the surface and in the minerals beneath, see *Rex v. St. Austell*, 5 Barn. & Alders. 693; 1 Dowl. &

Ryl. 351; *Rowe v. Grenfel*, Ryan & Moody, 396; *Rowe v. Brenton*, 3 Mann. & Ryl. 136, 7, 8; *Andrews v. Whittingham*, Carth. 277, 1 Salk. 25, 4 Mod. 143, Comberb. 201, and 1 Show. 364; *Rex v. Tremayne*, ante, 194.

And another, Executors of ELIZABETH STENTON, v.

DICKENS.

**ASSUMPSIT** on a promissory note. The second count of the declaration was as follows: And whereas the defendant, in the life-time of E. S., to wit, 25th March, 1824, in the county aforesaid, made his promis-

Where, upon a count on a promissory note payable by instalments, averring non-payment of

such instalments, the defendant pleads non-assumpsit, and brings into Court a sum of money less than the amount of the instalments, he thereby admits the special contract, but does not admit the non-payment of the instalments, except to the extent of the money brought in. And if he also pleads the statute of limitations, he will be entitled to a verdict, unless the plaintiff prove a sufficient acknowledgment of a liability to pay something ultra the sum brought into Court.



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 DUKKONIA.

some note in writing, and thereby promised to pay E. S. 231 $\frac{1}{2}$  as follows; 35 $\frac{1}{2}$ ., part thereof, on the 29th day of September then next ensuing; 35 $\frac{1}{2}$ ., other part thereof, on the 25th day of March then next; and 40 $\frac{1}{2}$ ., other part thereof, on the 29th day of September then next; 40 $\frac{1}{2}$ ., other part thereof, on the 25th day of March then next; and 40 $\frac{1}{2}$ ., other part thereof, on the 29th day of September then next; and 41 $\frac{1}{2}$ ., residue thereof, on the 25th day of March then next, with lawful interest for the said 231 $\frac{1}{2}$ ., or so much thereof as should from time to time remain unpaid, being for value received; and if default should be made in any one or more of the said payments for thirty days after the same respectively should be due, then the whole or whole remainder of the said 231 $\frac{1}{2}$ . and interest should become due on demand; and the defendant on the said 25th day of March, 1824, in the county aforesaid, delivered the said note to E. S., and promised her to pay the same according to the tenor and effect thereof. Averment, that the several times for the payment of the said several instalments have elapsed.

Upon this count the defendant paid into Court the sum of 110 $\frac{1}{2}$ l. 10s. 6d., without apportioning any part of that sum to any particular instalment, and pleaded the general issue and the statute of limitations.

At the trial before *Taunton, J.*, at the last assizes for the county of Nottingham, the plaintiff produced the note for bringing money into Court, and contended that the effect of this payment upon the special count, was to entitle him to recover the whole residue of instalments and interest, unless the defendant could shew payment of such residue. On the part of the defendant, the case of *Long v. Greville* (a) was cited from *Roscoe* on Evidence; and upon the authority of that case the learned judge nonsuited the plaintiff, but gave him leave to move to enter a verdict for the difference between the sum paid into Court and the sum alleged to be due on the note.

(a) 12 C. 100. (a) 4 Dowl. & Ry. 632; 3 B. & C. 19. 1829 12 C. 100.

*Whitehurst* now moved accordingly: "The question here is, as to the effect of payment of money into Court. *Long v. Greville* is, in truth, an authority in favour of the plaintiffs. That was an action of assumpsit for goods sold and delivered, and on the common money counts. The defendant pleaded non assumpsit and the statute of limitations, and paid money into Court generally. It was there said, "Where money is paid in upon a declaration setting forth a special contract, that is admitted as alleged." If money is paid into Court on a count which states a special agreement, the contract is admitted as there stated, and all is admitted to be due that is thus claimed. [*Denman, C. J.* This payment upon the count admits, undoubtedly, the special contract; but does it admit a debt to a greater amount than the sum paid in? It may be, that after the time of limitation had elapsed, the defendant wrote a letter, in which he promised to pay the sum of 110*l.* 10*s.* 6*d.*; would this admit a liability beyond that amount? *Parke, J.* He admits liability, under that special contract, to the amount of 110*l.* 10*s.* 6*d.*; he admits a contract, such as that set out in the count, and that he has no answer as to 110*l.* 10*s.* 6*d.*, but as to the remainder, says he has a defence. *Denman, C. J.* He may, under this payment of money into Court, shew the state of circumstances that limited his liability.] By payment of money into Court, the defendant admits the entire contract; *Dyer v. Ashton (a)*; and that the plaintiff, at the time of such payment, has a right of suit upon such contract. "A defendant cannot both admit and deny an entire cause of action, nor can he plead the statute of limitations to part of one indivisible contract. [*Parke, J.* Any defence, by way of confession and avoidance, would be open to the defendant.] Suppose the defendant had paid this 110*l.* 10*s.* 6*d.* to the plaintiff, the effect of the payment would have been to take the case out of the statute of limitations. In *Rucker v. Hannay (b)*, the defendant merely

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DROGONS.

(a) 2 Dowl. & Ryd. 19; 1 Barn. & Cressw. 3. (b) 4 East, 604, n.

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stated to the Court in an affidavit for leave to plead the statute of limitations, that since the bill of exchange upon which the action was brought became due, which was more than six years before, no demand for payment had been made on him, and this was deemed sufficient to be left to the jury as an acknowledgment; and the jury having found a verdict for the plaintiff, the Court refused to grant a new trial. There is also a later case of *Leaper v. Tutton* (a). [Parke, J. You will find a great number of old cases in the books, with respect to the statute of limitations, which are not law now.] It is difficult to draw the line between the old cases and the new, and the 16 *East* is generally considered as not containing old cases. [Parke, J. The line is to be discovered, by seeing whether the facts import a promise to pay within the time of limitation.] This case is stronger than those in which there is a mere promise to pay, for here is an actual payment. No case has been found where the defendant has paid part, and pleaded the statute; but there is a set of cases somewhat analogous to this, where one of two joint contractors, as by a promissory note which has been barred by the statute, pays a sum of money upon that note, this takes the note out of the operation of the statute as to the other joint contractor; *Burleigh and others v. Stott* (b), and other cases. A fortiori, therefore, when a defendant himself pays a part, this takes the case out of the statute. In *Israel v. Benjamin* (c), Lord *Ellenborough* held, that after payment of money into Court on a promissory note, a defendant could not object to the insufficiency of the stamp.

DENMAN, C. J.—It is clear that the payment of money into Court upon the special count admits a liability upon the contract to the amount paid in. There may have been

(a) 16 *East*, 470.

(b) 3 *Mann. & Ryl.* 93; 3 *Barn. & Cress.* 36. And see *Manderston v. Robertson*, 4 *Mann. & Ryl.*

440, in which a case was taken out of the statute of limitations by a credit given in account.

(c) 3 *Campb.* 441.

a liability to the extent of 110*l.* 10*s.* 6*d.*, owing to particular circumstances, notwithstanding the statute of limitations, and yet those circumstances may not have created a liability beyond that particular amount (a).

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PARKE, J.—This is quite a clear case upon the short ground stated by my lord. The payment admits the contract as alleged, and a liability to the amount paid in; but as to the remainder, the statute of limitations may be taken advantage of. The case is analogous to that of an express admission of the contract, accompanied with a statement that no more than 110*l.* 10*s.* 6*d.* is due.

TAUNTON, J. concurred.

PATTESON, J.—This is quite a clear case. *Cox v. Parry* (b) goes the full length of this case. It is quite clear that, as was there held, payment of money into Court admits liability to the amount paid in; but it does not preclude the defendant from taking any objection to the plaintiff's right to recover beyond that amount.

Rule refused (c).

(a) If the defendant had brought the 110*l.* 10*s.* 6*d.* into Court, and had pleaded the general issue only, though he would not have thereby acknowledged that more than that sum remained due, yet having admitted a contract to pay a larger sum, it would have lain upon him to shew, by payment, release, or other matter, now admissible in evidence, under the plea of non assumpsit, that the larger demand, admitted to have once existed, had been since reduced to or below the sum of 110*l.* 10*s.* 6*d.*

(b) 1 T. R. 464. And see 1 Wms. Saund. 33 (c); *Jenkins v. Tucker*, 1 H. Bl. 90; *Gutteridge v. Smith*, 2 H. Bl. 374; *Watkins*

v. Towers, 2 T. R. 275; *Bennett v. Francis*, 2 Bos. & Pull. 550; *Muller v. Hartshorne*, 3 Bos. & Pull. 556; *Guilod v. Nock*, 1 Esp. N. P. C. 347; *Middleton v. Brewer*, Peake, N. P. C. 15; *Yate v. Willen*, 2 East, 128; *Rucker v. Palgrave*, 1 Campb. 155; *Cox v. Bruin*, 3 Taunt. 95; *Godsall v. Boldero*, 9 East, 72, 79.

(c) The rule here laid down applies equally to the admission which is implied by a plea of tender; or to the admission implied by any other special plea, so far as the allegations to which such special plea is addressed are not also met by the general issue.

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DOMETT and others v. BECKFORD.

The consignor is liable for freight, although by the bill of lading the goods are to be delivered to the consignee, he paying freight for the same, and they are delivered to the consignor without payment being required.

ASSUMPSIT for freight. Plea: the general issue. At the trial before *Denman, C. J.*, at the sittings at Guildhall after last Trinity term, the plaintiffs, as ship-owners, claimed the freight of sugar and rum from the defendant, the consignee. The goods had been consigned by the defendant, who was the producer, to Messrs. *Plummer and Wilson*, and in the bill of lading it was expressed that the goods were consigned on account and risk of *William Beckford*, unto Messrs. *Plummer and Wilson*, or their assigns, they paying freight for the same, at a certain rate. The ship was reported as arrived in the West India Docks on the 13th of August, 1830, and the produce was delivered to and sold by Messrs. *P. and W.* soon afterwards. On the 27th November, 1830, Messrs. *P. and W.* stopped payment. On the 2d December a commission issued against them, under which they were declared bankrupts. On the part of the defendant several witnesses stated that they knew of no instance occurring in London, in which where produce had been delivered to a consignee under a bill of lading, the consignor was called upon to pay freight, and *Drew v. Bird* (a) was cited. The learned Chief Justice, after examining that case and the note of the case of *Barker v. Havens* (b), cited in the American edition of *Abbott on Shipping*, 652, directed the jury to find a verdict for the amount of the freight, but gave the defendant leave to move to enter a nonsuit. A verdict having been found accordingly.

F. Pollock now moved to enter a nonsuit. The question is, whether the consignor is to be held liable for freight, when the goods have been delivered to the consignee without payment of freight, the bill of lading requiring the delivery to be upon payment of freight, and it being established that it is not the custom in such a case to look to

(a) 1 Moody & Malk. 156.

(b) 17 Johns. Rep. 234.

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the consignor for payment. The only remedy which the carrier had against the consignor, was the lien which he had upon the goods before delivery to the consignees. [Parke, J. How do you propose to distinguish this case from the many which have been decided, as *Tapley v. Murters*? (a)] Here, it was proved that the usage is to look to the consignee. [Denman, C. J., having read his notes of the evidence upon the point of usage, Parke, J. said, there really is no evidence of a custom discharging the consignor.] Independently of the custom, the case of *Drew v. Bird* is sufficient to raise a doubt so as to make this a question proper for discussion. Lord Tenterden, in summing up in that case, said, "The bill of lading directs them to deliver to Griffiths, (the consignee,) he paying freight. They delivered without receiving it. They cannot thereby make Bird (the consignor) liable to them if he were not so originally; and on the face of the bills of lading nothing appears to charge him." [Parke, J. The consignor is the contracting party, and must be liable to pay the freight.] In general the consignor is liable, but where he orders the goods to be delivered to the consignee, he paying freight for the same, he makes the payment of freight by the consignee a condition precedent to the delivery by the carrier.

PARKE, J.—This case is not distinguishable from *Shepard v. De Bernales* (b), and other cases. In *Shepard v. De Bernales* there was in the charter-party a clause directing that the goods should be delivered agreeably to bills of lading, and by the bills of lading the goods were to be delivered to the consignee or to his assigns, "he or they paying freight for the said goods," and it was held that the stipulation was for the benefit of the ship-owner, and not of the consignor, and that therefore the ship-owner might waive and deliver the goods to the consignee, looking to the consignor for payment. So here, the clause in the bill of lading is for the benefit of the ship-owner, and not of

(a) 8 T. R. 451.

(b) 13 East, 565.

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the consignor. I feel no doubt upon this case in the absence of custom, which I think clearly not proved.

TAUNTON, J.—I am of the same opinion. I see no evidence of custom.

PATTESON, J.—It was expressly decided in *Shepard v. De Bernales*, that the ship-owner does not, by signing a bill of lading in this form, lose his right of coming upon the consignor for the freight. This brings the case entirely to the question of custom, and I think none is proved.

DENMAN, C. J.—It appears that an American court has decided agreeably with this decision, which upon a question of mercantile law is satisfactory.

Rule refused (a).

(a) To protect himself from this liability, it might be prudent for the consignor to add the words "without recourse to the shipper (or shippers) of the said goods in case of non-payment of such freight by the said (consignee or consignees) or his (or their) assigns."

PENFRASE v. JOHNS, PETER, and BROWN.

In an action against magistrates for a distress under a regular conviction, but by a warrant informal in not setting out the jurisdiction, the Court, after a verdict for the defendants, refused to grant a new trial, the objection to the warrant not having been distinctly taken at the trial, and being strictissimi juris.

THE declaration contained four counts. The first was in trover; the second, for an excessive distress under colour of a warrant, for arrears of wages alleged to be due; the third, for impounding the plaintiff's goods off his premises; the fourth, for selling the goods for much less than they were worth. Plea: the general issue. At the trial at the last Bodmin assizes, before *Patteson, J.*, it appeared that *Johns* and *Peter* were magistrates, and in that character had made an order upon the plaintiff for the payment of wages alleged to be due from him to one *Curtis*. A warrant of distress was subsequently granted, and *Brown* was the constable who executed it. The conviction and the

warrant were produced. It was objected, as against the constable, that the warrant was bad upon the face of it, and therefore did not protect him; but the learned judge intimating his opinion that the warrant was sufficient for that purpose, *Coleridge*, Serjt., for the plaintiff, consented that a verdict should be entered for *Brown*. The case then proceeded as against the magistrates, when the question turned upon the goodness of the conviction, the point as to the sufficiency of the warrant not being distinctly raised. The conviction appearing to be good upon the face of it, a verdict was, under the direction of the learned judge, found for the magistrates.

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Coleridge, Serjt. now moved for a new trial, on the ground of misdirection. It is not intended to impugn the decision of the learned judge, with respect to the sufficiency of the warrant to protect the constable; but it is submitted that in an action against the magistrates it is not a sufficient defence that the conviction is good, if it be followed up by a bad warrant. This warrant is defective upon the face of it, inasmuch as it does not appear that the magistrates had any jurisdiction in the particular case. The 20 Geo. 2, c. 19, enacts, "that all complaints, differences and disputes, which shall happen between masters or mistresses and servants in husbandry, who shall be hired for one year or longer," extended by subsequent statutes to all terms; "or between masters and mistresses, and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other labourers, shall be heard and determined by a justice or justices." The magistrate has not jurisdiction in every case of master and servant, but only in those cases which were contemplated by the 20 Geo. 2, c. 19. That statute has reference to the statute of *Elizabeth*, and therefore applies only to those cases where the magistrates have the power of settling the rate of wages. It should appear upon the face of the warrant, whether the parties are such that the magistrates have jurisdiction, and

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for this purpose the nature of the service and of the contract should be stated; *Hardy v. Ryle (a)*, *Lancaster v. Greaves (b)*, and *Bramwell v. Penneck (c)*.

DENMAN, C. J.—Here is a good conviction. The objection to the warrant should have been taken at the trial. If any substantial interest would be affected we would not shut you out, although the objection was not taken before; but this is a very strict objection.

PARKE, J.—We are not disposed to let you have a new trial in order that you may raise a point which was not raised at the trial, and which is strictissimi juris.

TAUNTON, J. and PATTESON J. concurred.

Rule refused.

(a) 4 Mann. & Ryl. 63; 9 Barn. & Cress. 603.

(c) 1 Mann. & Ryl. 409; 7 Barn. & Cress. 536.

(b) 9 Barn. & Cress. 628.

The KING v. COCKSHAW.

The county in which a deponent is sworn to an affidavit to ground a rule for a criminal information, made before a commissioner, must appear in the jurat.

The Court will not enlarge a rule for a criminal information, in order that the affidavit on which the rule was obtained may be re-sworn.

A Rule nisi having been obtained for leave to file a criminal information for a libel,

Campbell, S. G. now shewed cause. The affidavit upon which the rule was granted cannot be read, the place at which the deponent was sworn not being mentioned in the jurat; *Rex v. Justices of West Riding of Yorkshire (a)*. [Taunton, J. Upon an indictment for perjury, it would be necessary to prove that the affidavit was sworn before a person who had jurisdiction.]

(a) 2 M. & S. 493.

Sir *James Scarlett* in support of the rule. The jurat is sufficient, as it appears that the party was sworn before a commissioner for taking affidavits in the King's Bench. [*Denman*, C. J. The commission for taking affidavits in the King's Bench is confined to particular counties (a). It does not, therefore, appear that the oath was administered by a competent person.]

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Sir *James Scarlett* then applied to have the rule enlarged, and for leave to have the affidavit resworn.

DENMAN, C. J.—The Court have been looking for some time for a precedent for such an application, and can find no precedent in cases of criminal information. There are some cases with reference to bail. The party ought to have come properly prepared in the first instance. No injustice will be done, as the party can still prefer an indictment.

Rule discharged, without costs.

(a) See 20 Car. 2, c. 5, s. 2.

THE KING v. TREGARTHAN.

COWLING moved for a rule to shew cause why the recognizance to keep the peace towards Mr. *Matthews*, which had been entered into by the defendant and his sureties, should not be discharged, or why the amount of the recognizance should not be reduced; and for a certiorari to remove the recognizance and information taken. From the affidavits it appeared, that the defendant and *Matthews* were rival tradesmen at Penzance, and casually meeting, some mutual recrimination took place between them as to their dealings in trade, *Matthews* using the expression that he had a rod in pickle for the defendant; to which the latter replied, that he would chastise *Matthews* with his own rod. The defendant, on the same day, in pursuance

The Court refused to interfere with the discretion of magistrates in taking security for keeping the peace.

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of his threat, wrote a letter to *Matthews*, in which he repeated the expression that he would chastise *Matthews* with the rod in pickle which *Matthews* had spoken of, and then proceeded to state several instances of supposed unfair dealing on the part of *Matthews*. The defendant was summoned before the mayor of Penzance the following morning, who ordered him to enter into a recognizance, himself in 100*l.*, and two sureties in 50*l.* each, to keep the peace towards *Matthews* for six months. A recognizance had accordingly been entered into by the defendant and two sureties. The affidavit further stated that the application to the mayor was made with a view to injure the defendant in his trade, and that the defendant believed he should be injured by it, since, in consequence of the large amount of the sum in the recognizance, the townspeople of Penzance would naturally believe he had some intention of taking the life of *Matthews*, or doing him some severe bodily injury; all intention of which he denied. In support of this application, it was argued by *Cowling* that it was evident that the expressions used by the defendant in respect of the rod were metaphorical, and meant that the defendant would expose some of *Matthews*' transactions in trade, and that the mayor had no authority to require the defendant to enter into the recognizance. [*Taunton, J.* Was there no information on oath?] There was; but the language of the information is, that *Matthews* was in fear, in consequence of "threats, language, and letters." The information does not authorize the requisition of the recognizance, since the mayor had no authority for that purpose, unless a specific cause be sworn to and shewn on the face of the information. There is a case of *Rex v. Hooper* (a); similar to this, in which the Court interfered.

By the COURT (b).—That is a very different case. The effect of the evidence, whether the language used was

(a) 1 Chit. Rep. 491.

(b) *Parke, J., Taunton, J., Patterson, J.*

metaphorical or not, was for the decision of the mayor. The motion raises a suspicion that the defendant had some intention of attacking *Matthews*. We cannot interfere with the discretion of the magistrate.

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Rule refused.

HOWELL v. BATT.

ASSUMPSIT for money had and received. Plea, the general issue. At the trial at the last Devon assizes before *Alderson, J.*, the following facts appeared:—

The plaintiff was a joint proprietor of a coach which ran between Exeter and London, and the defendant was the coach-office keeper at Exeter. The defendant was paid for his services, as well in respect of this as of other coaches, by *Clench*, a proprietor resident at Exeter, who charged the respective proprietors of every coach a certain sum for office expenses. It was customary to make up the coach account once a month, and to send the sums due to each proprietor. A packet purporting to inclose 25*l.* 14*s.*, but which contained, when the plaintiff received it, only 20*l.* 14*s.*, was sent by the defendant to the plaintiff. The defendant used to take the whole of the money received in respect of the coach, paid each proprietor his share, and debited his employer *Clench* with the amount. In this instance, *Clench* was debited with 25*l.* 14*s.*

A party who, in the character of *servant* to a debtor, receives money from his master to discharge the debt, is not liable to be sued by the creditor as for money received to his use.

The learned judge was of opinion, that as the defendant was the servant of *Clench*, and not of the plaintiff, the principle laid down in *Stephens v. Badcock* (a) applied, and directed the plaintiff to be nonsuited, giving leave to move to set that nonsuit aside, on the ground that the defendant, by certain admissions, was precluded from saying he had never received the money in question.

Dampier now moved to set aside the nonsuit. There

(a) 3 Barn. & Adol. 354.

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was a sufficient transfer of the money from *Clench* to the defendant, to estop the latter setting up as a defence that he was the servant of *Clench*; for it appeared in evidence that a letter had been shewn to the defendant, in which the plaintiff stated the circumstances of his claim, and requested the witness, to whom the letter was addressed, to make inquiries. In the letter was this expression: "I understand that *Batt* (the defendant) has received the money from Mr. *Clench*;" and in another part, "Mr. *Clench* says he has nothing more to do with it, he paid the full sum to *Batt* (the defendant)." The defendant having read over the letter, said it was perfectly true he had received the money, and that he had sent it correctly to the plaintiff. Had he said he had not received the money, but had transferred some of *Clench's* money in his hands, as servant, to the plaintiff, the plaintiff would not have been misled in his suit; but after having so received it, as he has acknowledged, he received it for the use of plaintiff. The principle is found in *Edwards v. Hodding* (a), where the defendant, who had induced the plaintiff to suppose he still retained certain money, was held to be precluded from a defence arising from the fact that he had paid it over. [*Parke, J.* What has happened to discharge *Clench* from his liability?] The plaintiff may have a remedy against both.

By the COURT.—The plaintiff could not maintain his action, as the defendant was the servant or agent of *Clench*. This case is clearly not distinguishable from the case of *Barron v. Husband* (b), of which we have a note before us.

Rule refused (c).

- (a) 5 Taunt. 615; 1 Marsh. 577. Campb. 40; *Braddock v. Creed*,
 (b) 4 Barn. & Adol. 611. Mann. N.P. Dig. 3d ed. 300;
 (c) App. F. N. B. 412, B. And *Grylls v. Davies*, 2 Barn. & Adol.
 see *ibid.* D; *Evans v. Birch*, 3 514.

1833.

DOE, on the several demises of CHAPEAU, BOURNE and
others vs REYNOLDS and another.

EJECTMENT for copyhold lands within the manor of Hallow, in the county of Worcester. At the trial before Gurney, B. at the last Worcester assizes, a verdict was found for the plaintiff upon the demise by *Bourne*, for a portion of the lands sought to be recovered; and as to the remainder, a verdict passed for the defendant. By the custom of this manor, copyholds are granted for the lives of four persons, of whom one is admitted tenant in possession, and the others are admitted at the same time as tenants in reversion. The name of the party beneficially interested is not inserted as one of the ceteux que vies. It is usual to admit a tenant on the bare declaration of the parties beneficially interested, that a deed conveying the interest of the parties to a purchaser is about to be prepared. In pursuance of an order of the Court of Exchequer for carrying into effect the trusts of the will of *John Bellamy*, the premises in question were sold to the defendant *Reynolds*. *Reynolds* being unable to pay the whole of the purchase money, obtained an advance of 2,000*l.* from Captain *Chapeau*; and it was agreed between these parties that an annuity of 210*l.*, which was to be secured by bond, should be granted by *Reynolds* to *Chapeau* for the life of *Chapeau*. The premises demised by *Bourne* were then, in consideration of 1,250*l.*, surrendered to the use of *Chapeau* "as annuitant by bond," and subject thereto, to the use of *Reynolds* as the purchaser. At a court baron^(a) held on the 11th October, 1814, the lord granted the premises to *William Adams* for life, "in trust and for the use of *Chapeau*, *an annuitant by bond*; and subject thereto, in trust, for *Reynolds*, his executors, administrators and assigns, as purchaser; remainder to *W. Hoynes*, *S. Bourne*, and *J. Brown*, successively for life, upon the like trusts."

A copy of court roll admitting a surrenderee, in trust for the grantee of an annuity there stated to be secured by the bond of the purchaser, and subject thereto to the use of the purchaser, his executors, administrators and assigns, requires an ad valorem stamp in respect of the purchase money expressed to be so paid by the purchaser to the surrenderor, but without reference to the annuity,—whether the statement is taken to refer to an annuity already granted, or to an annuity to be created in futuro.

(a) i. e. at a customary court, court baron. Vide 5 Mann. & held at the same time and place, Ryl. 143 (a).
but wholly unconnected with the

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William Adams died; and at a Court held 27th October, 1818, the premises were granted to *Haynes* in possession, remainder to *Bourne*, *Brown*, and *Reynolds*, successively for life, upon the same trusts. *Haynes* then died; and at a Court held 17th October, 1820, the lord granted the premises in possession to *Bourne*, remainder to *Brown*, *Reynolds*, and *Lowe*, successively, for life, upon the same trusts. On the 16th July, 1818, an annuity deed and bond to secure the annuity were executed by *Reynolds* to *Chapeau*. This deed and bond were offered in evidence at the trial, but being objected to, were rejected for want of an ad valorem stamp (a). A copy of the court roll of 11th October, 1814, bearing a 10*l.* stamp, was then offered in evidence, as were also those of 27th October, 1818, and 17th October, 1820. It was objected by *Ludlow*, Serjt. to the admission of the copy of court roll of the 11th October, 1814, that the 10*l.* stamp was insufficient, and contended that the plaintiff ought to be nonsuited. The learned judge, however, was of opinion, that the stamp being the ad valorem amount upon the consideration stated, 1,250*l.*, was sufficient, overruled the objection, and directed the jury to find a verdict for the plaintiff as to these premises, but gave the defendant leave to move to enter a nonsuit.

Ludlow, Serjt. now moved accordingly. The plaintiff having failed to prove his title by the deed and bond, in order to recover a portion of the premises which had been sold for 1,250*l.*, proposed to shew that *Bourne* had actually been admitted tenant, and for this purpose the court rolls were put in. The surrender and admittance of October, 1814, were made long before the regular settlement of the annuity by the deed and bond, and were at the time the only security for the annuity. The entry in the court rolls of this date is made to secure the interest as well of *Chapeau*, who is a mortgagee, as of *Reynolds* the purchaser;

(a) *Quere* the effect of these instruments, if they had been received in evidence, upon the right of possession in the lessor of the plaintiff, which appears to depend on the admittances, and particularly that of 17th October, 1820.

but the stamp is of 10*l.* only, which upon reference to the 48th Geo. 3, it will be found, is the amount which would be required if this instrument had related only to the purchase by *Reynolds*. In 48 Geo. 3, schedule, part the first, under the head of 'Mortgage,' it is thus provided: "When any deed or writing shall operate as a mortgage or other instrument hereby charged with the ad valorem duty on mortgages, and also as a conveyance of the equity or right of redemption, or reversion of any lands, estate, or property therein comprised, to or in trust for, or according to the direction of a purchaser, such deed or writing shall be charged not only with the said ad valorem duty on mortgages, but also with the ad valorem duty hereinbefore charged on a conveyance upon the sale of any property." In *Comes and others v. Perry and others* (a), which arose on 56 Geo. 3, cap. 184, personal property was assigned by a debtor by deed, to certain creditors, in trust, in the first place, to pay themselves, and then in trust to pay the other creditors of the assignor, and to pay the surplus to the debtor. This deed had not an ad valorem stamp; and it was contended, that it was on that account inadmissible in evidence. The Court held that an ad valorem stamp was not necessary, because the object of the deed was to pay the creditors; and by the Stamp Act, a deed made for the benefit of creditors generally, is exempted from the ad valorem duty. But this is not a deed for the benefit of creditors, and the double nature of the security appears clearly upon the entry. The copy of court roll stands precisely in the condition contemplated in the clause of the schedule which has been referred to. Under the head 'Conveyance,' in this schedule, the following provisions will be found: "And where, upon the sale of an annuity or other right not before in existence, the same shall not be created by actual grant or conveyance, but shall only be secured by bond, warrant of attorney, covenant, contract or otherwise, the bond or other instrument, by

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(a) 3 Brod. & Bingh. 48; 6 B. Moore, 188.

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which the same shall be conveyed, or some one of such instruments, if there be more than one, shall be deemed and taken to be liable to the same duty, as an actual grant or conveyance." Here, there having been a sale of an annuity, and nothing else by way of evidence of it than the entry in the court roll, that document ought to be stamped. [Taunton, J. There is no mention of the amount of the annuity.] It would be a very easy mode of evading the provisions of the Stamp Act, if a party, by not putting an instrument into a more regular shape, could make it evidence without a stamp. [Taunton, J. I do not see how this is an available security for the annuity. The document only says, that the lives are to hold in trust for *Chapeau*, an annuitant by bond.] This is a security, inasmuch as it enables *Chapeau* to bring ejectment. [Parke, J. The instrument is charged with the ad valorem duty. There is no doubt that, under this state of things, the bond ought to be stamped; but I cannot find it any where said, that an admittance reciting that a party is an annuitant by bond, ought to be stamped. The legal title passed on the 11th October, 1814, to *Bourne*, and it makes no difference to his estate, whether the bond was or was not stamped afterwards. Denman, C. J. Suppose there had been no bond what-ever—put that out of the question, how do you shew that *Reynolds* was liable to pay the annuity? Parke, J. The real truth is, that *Chapeau* was not, at the time of making the entry, a bond annuitant.] This entry falls within the provisions of the clause relating to the sale of an annuity or other right not before in existence. It is not competent to *Bourne* to say that *Chapeau* was not an annuitant, because in the only document from which he claims title, he admits that *Chapeau* is an annuitant. [Patteson, J. Are we to presume that the bond was not properly stamped? The words in the entry are an admission that there is an annuity, but secured by bond. Parke, J. Coupled with the evidence, it is an admission that *Chapeau* was intended to be an annuitant by bond. The truth is, that the vice is in

not stamping *the bond*.] Can the Court strike out these words? It is evidently intended that they shall have some operation. If it be not an annuity secured of a particular amount, yet if it be any annuity at all, there must be at the least a stamp of 1*l*. This entry is at all events intended to be a security for *some* annuity, until a better security shall be executed.

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DENMAN, C. J.—It appears to me that no sufficient objection has been made out to the reception of the copy of the admission in evidence. The stamp is quite right, if the admission is of the purchaser only. It appears that Mr. *Chapeau* is described in the admission as an annuitant. If he was an annuitant, the stamp must have been properly placed upon some deed, because the word ‘annuitant’ must be taken in its perfect sense. Supposing, however, there was no deed. The steward may have acted improperly in calling *Chapeau* an annuitant, when in fact he was not so, yet this could not invalidate the copy of court roll. Supposing that it was intended that a deed should be thereafter executed, and that it was so executed, it must be taken to have been afterwards duly stamped. I cannot discover any objection to the copy of court roll. All that is done must be presumed to be properly done. If it is not so done, the parties have subjected themselves to penalties, but the instrument is admissible in evidence.

PARKE, J.—It appears to me also that there is no ground for this motion. The plaintiff’s title depended upon that of *Bourne*. The legal estate was in him by virtue of the surrender and admittance of 11th October, 1814. The objection is, that the grant is not properly stamped. The grant creates a trust for *Chapeau*, “*an annuitant by bond*.” These words may mean either that an annuity had been granted, or it may be that the words were inserted by mistake, and that no annuity had been granted or was intended so to be; or the words may mean that some annuity was

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intended to be thereafter created. Then let us consider whether the act imposes a stamp upon the admission on either of these three suppositions. Under the head "*mortgage*" an additional stamp is imposed in certain cases, but this is not one of those cases upon the supposition that at the time there was an existing bond. The *ad valorem* duty would be a duty upon the bond itself. But if it could be shewn that upon the bond there was no stamp, the party would be liable to a penalty. I have not been able to find any other clause under this head, which imposes a stamp in this case. Upon the second supposition, that there was no annuity, and that none was intended to be made, it is sufficient to say, that if there was no annuity, no stamp duty was payable. And so upon the third supposition, no stamp duty was required to be paid until the annuity was actually created by deed. Under the head "*mortgage*," therefore, no stamp duty is required upon any of these three suppositions. Under the head "*conveyance*," the rate of duties is proportioned to the amount of the purchase or consideration money therein or thereupon expressed, and if this consideration is not expressed, the parties are liable to a penalty. Here no consideration for an annuity is expressed. Under that head, therefore, it is quite clear that no duty is imposed. I therefore think that there is no objection to the admissibility of this copy of court roll, on the ground that it has not been stamped with a proper stamp. Whether, when the annuitant seeks to enforce his claim for the annuity against the trustee, he will be able to do so without shewing a bond properly stamped, is another question which it is not for us now to decide.

TAUNTON, J.—This is an objection to impeach the validity of a solemn instrument. We ought not to overturn an instrument of this nature upon an objection of this kind, unless the truth stares us in the face, that it cannot be supported. This is a surrender to *Adams* for life, and *Haymes*,

*Bourne* and *Brown* in remainder. *Bourne* has survived *Adams* and *Haynes*, and has been admitted as tenant in possession, in trust for *Chapeau*, an annuitant by bond, and subject thereto in trust for *Reynolds* the purchaser. Now it is said that this circumstance of *Chapeau's* being described as an annuitant by bond, renders it necessary that a further duty should be paid. The duty actually paid was 10*l.*, which, considering it as a conveyance to *Reynolds*, is acknowledged to be the full duty. But if *Chapeau* were an annuitant by bond, he could only be so in one of two ways. Either a bond previously existed, and was then in existence, or it was intended that one should be entered into afterwards. If it is to be taken that a bond then existed, why are we, for the mere purpose of overturning the validity of this surrender and admission, to presume that the bond must be without a stamp? I think we certainly ought not to do so. But taking it in the second sense, and supposing that an annuity bond was intended to be made at a future time, how was it possible to put the superior duty upon this instrument? The duty is payable upon the transaction effected by the bond, and the stamp must be upon the bond itself, and proportioned to the amount of the annuity granted. It cannot surely be said that the duty is to be paid prospectively upon a non-existing instrument. If indeed *Chapeau*, not content with the security, had thought proper to have a bond executed, then the duty would have attached, and if the stamp had not been placed upon the instrument, some penalty would have been incurred for evading the duty. But unless he chose to call for that additional security, the duty upon the annuity by bond could not be required.

PATTESON, J.—I am entirely of the same opinion. It appears to me clearly that the duty is imposed by the stamp acts, upon the instrument creating the annuity. The present document does not create an annuity. It evidently refers to some instrument already created or to be created,

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I do not think it matters which, and in either case we must presume that the right stamp has been or would be affixed.

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After an appeal entered and respited, and notice of an intention to try at the second sessions, at which sessions the appeal is again respited at the instance of the appellant, the appellant is not bound to give notice of his intention to try at the following sessions, unless such notice be required by the rules of the particular sessions.

In the absence of evidence of the existence of a rule requiring such notice, the original notice of trial will be considered sufficient to entitle the appellant to try his appeal at the third sessions.

IN Easter term last *Blackburne* had obtained a rule nisi for a mandamus to the justices, to cause continuances to the next General Quarter Sessions for the riding to be entered, upon the appeal of *James Bower* against the accounts of *Frederick Robert Jones* and *Joseph Taylor*, the commissioners for inclosing lands in the manor of Meltham, in the parish of Almondbury, in the said riding, purporting to have been examined, balanced and signed by certain of the justices of the said riding, on the 14th day of Jan. 1831, 15th April 1831, 6th Aug. 1831, 22d Nov. 1831, 20th March 1832, and 31st Oct. 1832; and at such sessions to hear and determine the merits of the said appeal.

By 11 *Geo.* 4, and 1 *Will.* 4, c. 49, (Pr. C.) intituled "An act to amend an act of King *George* the Third, intituled 'An act for inclosing lands in the manor of Meltham, in the parish of Almondbury, in the West Riding of the county of York,'" *Jones* and *Taylor* were appointed commissioners to carry the same, and the acts therein recited, into execution.

By sect. 19, the commissioners were not at any time to permit or suffer any just claims or demands upon them, as such commissioners, to remain unpaid for a longer period than three calendar months, except the sums due to them and their clerk; and once, at least, in every three calendar months, they were to make a true and accurate statement or account of all sums of money by them received and expended, or due to them or their clerk for their respective trouble and expense in the execution of the said act or the

said recited acts; and in such statement or account were to be particularly specified the several items and articles for which each particular sum had been paid or disbursed; and such statement or account, when so made, together with the vouchers relating thereto, were to be by them laid before any two of his majesty's justices for the West Riding, to be by them examined and balanced, and such balance was to be by such justices stated in the books of account to be kept in the office of the clerk to the commissioners; and no charge or item in such accounts was to be binding on the parties concerned, or to be valid in law, until the same should have been duly allowed by such justices, and until such account, or the abstract thereof, should have been published in certain newspapers.

By sect. 20, if any person should think himself aggrieved by any thing done or omitted to be done in pursuance of the said act, or the said recited acts, or either of them, he might appeal to any general or quarter sessions of the peace, to be holden for the West Riding of the county of York, within four calendar months next after the cause of complaint should have arisen, *giving to the said commissioners and to the party or parties concerned notice in writing of such appeal, and of the matter thereof, ten days before such general or quarter sessions*, (except with respect to the accounts of such commissioners, which, notwithstanding the same should have been examined and published as aforesaid, might be appealed against *at any time within six calendar months after the date of the award of the said commissioners*, on giving to the said commissioners such notice as last aforesaid).

The affidavits on which the rule nisi was obtained, stated as follows:—On the 14th Jan. 1831, 15th April 1831, 6th Aug. 1831, 22d Nov. 1831, 20th March 1832, and 30th Oct. 1832, accounts were laid before the justices of the riding, and allowed by them. At the October sessions, 1832, an appeal was entered at the general quarter sessions of the peace held by adjournment at Leeds, by *James Bower*,

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against the accounts of the commissioners. On the 22d day of Dec. 1832, the commissioners were served with a notice, which stated that the appellant, being a freeholder of the manor of Meltham, and thinking himself aggrieved, did intend, at the next general quarter sessions of the peace to be holden by adjournment at Wakefield, in and for the said riding, on Thursday, the 3d day of January next, to try an appeal which was entered and respited at the last general quarter sessions of the peace, holden by adjournment at Leeds, against the several accounts of the said commissioners. The notice then specified the accounts, and stated the grounds of appeal.

On the 1st of January, 1833, the appellant gave the commissioners notice that he should, on the 3d day of January, 1833, at the general quarter sessions holden at Wakefield on that day, move the Court to respite the appeal until the next general quarter sessions of the peace, to be holden at Pontefract, and that the accounts of the respondent should be referred to one or more of his majesty's justices of the peace, or to such other person as the court should direct. At the sessions holden at Wakefield, the appeal was respited, but the commissioner, *Joseph Taylor*, would not consent to refer the accounts.

An order was made by *Patteson, J.* to compel the clerk to the commissioners to deliver in his bills, in order that they might be taxed.

On the 2d of April, 1833, the appellant gave the respondents notice, that at the sessions to be holden at Pontefract, on Monday, the 8th day of April then next, he should move the Court to respite the appeal; and that the grounds on which such motion would be made were, that the respondents had not passed the whole of their accounts, and that the bills of their clerk had not been taxed.

On the 11th of April a motion was made to the justices, on behalf of the appellant, to respite the appeal and refer the accounts, when the chairman of the court of quarter sessions intimated that it must be called on in its regular

course, and that if the appellant was not prepared to try his appeal, it must be struck out; and the said appeal was on the following day again called on, and the majority of the magistrates refused to respite the appeal or to refer the said accounts to some one for examination, unless the whole of the accounts of the former commissioners were also referred; and in consequence of such refusal, the counsel for the appellant stated he would go on with the appeal; and one of the counsel of *Frederick Robert Jones* immediately called for proof of notice of appeal for the said *Pontefract* sessions, which the appellant was not able to do, there not having been a notice given to these sessions, as it was not considered necessary to give a fresh notice of appeal; and the appeal was in consequence struck out of the list, whereby the allowance of the commissioners' accounts stands confirmed.

It was further stated, that the appellant was desirous of respiting the appeal, in order that the bill of the attorneys of the commissioners, which was included in their accounts, might be taxed.

On the 10th of July, 1832, the commissioners made their award.

The affidavit filed on the part of the commissioners stated, that at the sessions at Pontefract, *Frederick Robert Jones* was ready and desirous, and that the appellant was not prepared, to enter into the appeal, and that the counsel for the appellant declared openly in court that he was not ready to enter into the said appeal. It was also stated that the question as to whether a notice had been given to the *then sessions* was never raised and decided, and that the appeal did not go off, on the ground that no such notice had been given.

*F. Pottock* and *Dundas*, (for *Taylor*), and *Milner*, (for *Jones*), now shewed cause. The act has given the right to appeal against the allowance of the accounts of the com-

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missioners within a limited time, specified in the act. As to the three-fourths of the accounts of these commissioners, the appeal was too late; as to a portion of them, an appeal was entered within the time of limitation, and was respited from the October Sessions until the next January Sessions, previously to which a regular notice of intention to try the appeal was given, and countermanded by a notice of intention to move for a respite. The party might have entered upon the appeal at that time. It is obvious that the object of the notice was, not to try the appeal, but to drive the commissioners into a reference. At those sessions the appeal was, upon motion, respited until the April Sessions. No notice was given of an intention to try at these sessions. By the act, ten days' notice, and according to the practice of the West Riding Sessions, ten *clear* days' notice of appeal is required. The Court of Quarter Sessions was therefore right in refusing to enter into the appeal without proof of such a notice. The Court of Quarter Sessions having made it a rule of practice that ten days' notice shall be given, this Court will not interpose. In *Rex v. Justices of Essex* (a), it was said, *per Curiam*, "The sessions are the judges of their own practice; and before we can interfere to regulate that practice, it must be shewn that it is extremely wrong or unjust." In no instance has the notice been dispensed with after the appeal had been respited, except where it has been respited at the instance of the respondent. With regard to the respite, the appellaut has no right to have his appeal respited from session to session. This is a matter entirely in the discretion of the Court; and they exercised a sound discretion in refusing to respite a third time. This Court will not interfere with the exercise of their discretion by granting this mandamus: *Ex parte Becke* (b), *Rex v. Justices of West Riding of Yorkshire* (c). If they were to do so, they would exercise the powers of a court of error.

(a) 2 Chitty's Reports, 385.

(c) *Coram Tuunton, J.*, in the

(b) 3 Barn. &amp; Adol. 704.

bail court, not reported.

*Blackburne*, in support of the rule. The party was not too late to appeal against the whole accounts. The award was signed on the 10th July, and the appeal was entered at the following Michaelmas Sessions. The accounts of the commissioners, it is true, were passed from three months to three months, but when the whole account was wound up and allowed by the justices, then a party might appeal against them generally. These accounts were appealed against within six months after they were wound up and respited, according to the ordinary practice. At the second sessions the appeal was respited for cause. A third time a respite was applied for upon the same ground, and refused. The same reason existed as before. This Court has a discretion to exercise as well as the court below. If the Court sees here that injustice will be done by shutting out this party from appealing; they will interfere by mandamus. The ground upon which the respite was once granted, and at the next sessions applied for, was, that a large item of the account against which the party was appealing, was in the course of being inquired into by the only proper authority, namely, the officer of the Court of King's Bench. Upon this ground the respite ought to have been granted. The case went off at the sessions upon the question as to the notice of appeal. A notice had been given at the preceding sessions. It has been held in many cases, that a second notice is not necessary, where a notice has been given, and the matter respited, and an order of respite served; *Rex v. Lambeth* (a), *Rex v. Buckinghamshire* (b), *Rex v. Hertfordshire* (c), *Rex v. Lancashire* (d). The affidavits do not state what is the practice of the sessions in case of a respited appeal; nor does this appear from the printed rules of the West Riding sessions. Whatever may be the rule of practice, this Court will interfere to see that it is reasonable. This Court has a discretion

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(a) 3 Dowl. & Ryl. 340.  
(b) 6 Dowl. & Ryl. 142.

(c) *Ante*, vol. i. 331.  
(d) 7 B. & C. 691.

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to say, whether after respite notice is requisite. In *Rex v. Wiltshire* (a) it is said, by Lord *Ellenborough*, that this Court had a kind of visitatorial power over the sessions in the exercise of their discretion.

DENMAN, C. J.—I have always understood that this Court will interfere to see that no illegal practice prevails at the Court of Quarter Sessions. In this case, the appeal was at first clearly and properly brought before the Court, because the terms of the act had been complied with. The appeal was then respited once or twice. Then at the sessions to which it was respited, the appellant, having given five days' notice, which was enough to prevent the party from being put to expense, came forward to apply for a further respite, which was refused. Then the appellant proposed to have the matter referred, which the commissioners refused to do, as they had a right to do. The appellant was then called upon to prove his notice of intention to try the appeal, which it is clear from the affidavits refers to a notice for the then sessions. Such a notice he was not bound to give, and the Court had no right to employ their power of dismissing the appeal, for the purpose of compelling parties to submit to a reference (b). I think the justices ought to be told they have done wrong in refusing to hear this appeal.

PARKE, J.—I also think that this rule ought to be made absolute. I doubted during the course of the argument, owing to the difficulty I had in ascertaining how the facts were. The province of the Court is clear. This Court has no superior discretion which gives them a right to interfere with the exercise of the discretion of the court below; their duty is to keep the inferior court within the limits of

(a) 10 East, 404.

(b) i. e. of all the accounts, including those of the former commissioners. The appellant applied

for a reference of the particular accounts specified in his notice, *ante*, 393.

its jurisdiction. One of the commonest cases for granting a mandamus is upon questions as to reasonableness of notices of appeal, because the sessions cannot act unless a proper notice has been given. Of this they are not the only judges. This is a question whether the sessions have acted contrary to their jurisdiction or not. An appeal to the quarter sessions is given by 11 G. 4, and 1 W. 4, c. 49, against the accounts of the commissioners, within six months after their award, giving notice in writing ten days before the sessions. The party had a right to appeal upon giving such a notice. Now it appears from the affidavits, that an appeal was entered and notice given, and that that appeal was respited. If at the subsequent sessions the Court had called for the proper notice only, and that having been produced, had refused in their discretion to respite, we could not have interfered. That is a matter peculiarly within their discretion. If the sessions had called for the original notice, they would have been quite right. The question upon which I entertain doubt is, whether the notice called for was the original notice, or a notice of trial at that sessions; but upon the whole I think we must conclude that the notice required was a notice for that sessions; and this I think was not necessary. *Rex v. Lambeth* decides, I think, that the sessions ought not to require a fresh notice of appeal, where the order of respite has been served.

TAUNTON, J.—If the Court had called upon the party to prove the original notice, and he had done it, and they had then refused to respite, I should say we had no right to interfere. But it appears that they proceeded either on the ground that there was no notice of intention to try the respited appeal at the Pontefract sessions, or that the appellant refused to comply with their recommendation. The latter would certainly be an illegal ground, and I cannot find that the former is a legal one. I do not find any rule of Court requiring that upon trial of a respited appeal, proof shall be given of a notice of intention to proceed upon such

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respited appeal. The great suspicion in my mind is, that the justices have refused to respite because the appellant had refused to adopt their recommendation. I therefore think that the rule for the mandamus must be made absolute.

PATTESON, J.—I am entirely of the same opinion. In this case the act requires ten days' notice of appeal, but there is no provision about a notice in a case where the appeal is respited. The appellant has complied with the terms of the act of parliament. Then why is he required to give a further notice? It must be either by some general rule of law (a), and I know of none; or by some rule of sessions, but I find no such rule. If there had been a rule of sessions, I do not say that we should have interfered. I think it would be too much to say that the rule should not be abided by. In *Rex v. Lambeth* (b) it was held, that the order of respite was equivalent to notice of trial. In the present case it was a question of fact upon the affidavits, what was the ground upon which the sessions proceeded. I think the appeal must have been struck out for want of a later notice; for I presume that the original notice had been proved before the respite, as without such notice the sessions would have no jurisdiction over the appeal to respite it.

Rule absolute (c).

(a) In *Jacks v. Mayer*, 8 T. R. 345, it was held "that if a cause be made a remanet, it may be tried at the next sittings without any further notice; but that if the trial be put off by rule of court, there must be a fresh notice of trial; and that even when a plaintiff gives a peremptory undertaking to

try at the next sittings or assizes, there also a new notice of trial must be given, because notwithstanding such notice or undertaking, the plaintiff may decline trying his cause."

(b) 3 Dowl. & Ry. 340.

(c) *Vide Rex v. Justices of Norfolk*, Hilary Term, 1834, *post*.

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## COTTON v. KADWELL and others.

**TRESPASS** for breaking and entering the plaintiff's dwelling-house, and taking his goods. Plea: the general issue. At the trial before *Bayley*, B. at the Kent summer assizes, 1833, the following facts appeared:

The plaintiff being assessed to the poor in the sum of 1*l.* 4*s.* 6*d.*, was, for non-payment thereof, upon the complaint of the defendant *Kadwell* the overseer, summoned before the justices. The plaintiff appeared in pursuance of the summons, and alleged that he was over-rated. This the magistrates did not think true; and they ordered him to pay the rate and the costs of the proceeding. After the parties had left the magistrates' room, a conversation took place between *Kadwell* and the plaintiff, when the plaintiff produced two sovereigns, and offered *Kadwell* to pay him the rate, and also the fees of the clerk of the magistrates, but not the constable's charges. This *Kadwell* refused to receive. Subsequently, however, the plaintiff offered to allow *Kadwell* to take the constable's charges out of the second sovereign, which the latter refused to do, saying, that he did not know the amount. *Kadwell* then went into the magistrates' room to ascertain what the charges were, and upon his return, found that the plaintiff was gone. After this, the distress was levied upon the goods of the plaintiff by *Kadwell* and the other defendants, (of whom one was a constable,) by virtue of a warrant of distress for 1*l.* 4*s.* 6*d.*, under the hands and seals of two magistrates. No demand of a copy of the warrant had been made before the commencement of the action. It was objected that the action could not be sustained against the constable or other person acting in his aid, without a previous demand and refusal of a copy of the warrant. This objection was overruled by the learned judge, who thought that no demand was necessary, as this was not a case in which there would be any remedy over against the magistrates. The learned

An order of magistrates being made upon a party to pay the amount of his poor-rate and the costs of a summons, he tenders the former without the latter, to the overseer. A subsequent warrant of distress for the poor-rate is illegal.

It is unnecessary to demand perusal and copy of a warrant in a case where there is no remedy against the magistrates.

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judge told the jury, that the first question for them to consider was, whether there had been a tender of the rate, and that if there had been such a tender, the defendants were liable for having afterwards distrained; that an offer to pay, requiring change, is not a good tender, if objected to on that ground; but that if the party of whom the change is demanded takes only another, and that an unjustifiable objection, the tender is good; that if they thought that the tender had been made, and that the defendant *Kadwell* had refused to take the money on the ground that the plaintiff had refused to pay that which he, the defendant *Kadwell*, was not entitled to claim, they ought to find for the plaintiff. The jury returned a verdict for the plaintiff, damages 10*l*.

*Platt* now moved for a new trial, and contended, first, that under the particular circumstances of the case, the offer to pay did not amount to a good tender, and that the defendant *Kadwell* had a right, under 18 *Geo. 3*, cap. 19, sec. 1, to claim the costs; and secondly, that under the 24 *Geo. 2*, cap. 44, sec. 6, a demand of perusal and of a copy of the warrant was necessary to be made before the action was brought.

**Per CURIAM.**—It is quite clear that in this case no demand of the perusal and of a copy of the warrant was necessary. The only question therefore is, whether *Kadwell* had a right to require the payment of the costs of the summonses. He refused to receive the amount of the poor-rate, unless the costs also were paid, or, at least, he postponed the accepting it until he had ascertained the amount of those costs. The remedy for costs, if within 18 *Geo. 3*, c. 19, is by warrant under the hands and seals of the justices. *Kadwell* had no warrant for the costs. All that he was entitled to under the warrant the party was willing to pay. To that extent there was a good tender, and therefore there must be no rule.

Rule refused.

1833.

HAYLLAR v. SHERWOOD, Gent. &amp;c.

**ASSUMPSIT** for the price of a horse, sold by the plaintiff, who is a horse dealer, to the defendant, on 8th October, 1831. Plea: the general issue, with notice of set-off. At the trial before *Denman*, C. J., at the London sittings after last Hilary term, it appeared that at the time of the sale, which was not disputed, the plaintiff was an uncertificated bankrupt, and that *before* the issuing of the commission he had become indebted to the defendant in an amount greater than the price of the horse. The assignees did not appear to have interfered with the bringing of the present action. The plaintiff obtained his certificate in the month of December, 1831. The action was commenced in Hilary term following.

*Thesiger*, for the plaintiff, contended that the debt due before the bankruptcy could not be set off, because it might have been proved under the commission, and that the circumstance of the plaintiff's being at the time an uncertificated bankrupt, did not affect his right to recover, unless the assignees interposed their superior title.

*Platt*, for the defendant, objected that the horse was not at the time of sale the property of the plaintiff, it having vested in his assignees under 6 Geo. 4, c. 6, s. 63, and that therefore the action could not be maintained.

The learned Chief Justice upon this nonsuited the plaintiff, with liberty to move to enter a verdict for 64l.

In Easter term following, Sir *J. Scarlett* obtained a rule nisi accordingly.

*Platt* (with whom was *G. T. White*) now shewed cause. The defendant was entitled to a nonsuit on two grounds; first, that on the 8th October, which was between the bankruptcy and certificate, the old debt was not discharged; and secondly, that the plaintiff, being an uncertificated bankrupt, could not sue upon the contract. [*Parke*, J.

The price of goods sold by an uncertificated bankrupt, may be recovered by him against the vendee, his assignees not interfering.

After the bankruptcy of *A.*, and before his certificate, *B.*, one of his creditors, purchases goods from him. In an action brought by *A.*, after obtaining his certificate, for the price of the goods, the old debt cannot be set off, being barred by the certificate.



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The certificate is a bar to the old debt. The statement in the notice of set-off would be, "that the plaintiff, at the time of the commencement of the action, was and still is indebted to the defendant in a certain amount;" which is not true.] Creditors may be exposed to great inconvenience, if the Court should hold that this debt cannot be set off. [*Denman*, C. J. The nonsuit proceeded entirely upon the question whether the bankrupt was entitled to sue upon the contract.] That is the second ground. In *Crofton v. Poole* (a) an action was brought by an uncertificated bankrupt, and after the issuing of the writ the defendant paid the debt to the plaintiff's assignees. It was contended that the action was brought to recover the price of the bankrupt's personal labour, to which the assignees were not entitled. On the other side it was denied that the debt was for personal labour; and upon this the question turned. The Court thinking that the debt had accrued to the plaintiff in the way of his trade as a furniture broker, and not merely for his personal labour, directed a nonsuit to be entered. [*Parke*, J. Here the assignees do not interfere at all. It is quite clear that the plaintiff had a good title against all the world, except the assignees, and they did not intervene. This was after-acquired property, which the assignees allowed the bankrupt to deal with, and therefore he may sue upon contracts relating to it, unless the assignees think proper to put in their superior claim.] By the 63d section of 6 *Geo.* 4, c. 16, all the bankrupt's property, present and future, is directed to be assigned to the assignees for the benefit of the creditors; and then it is said, "and after such assignment, neither the bankrupt, nor any person claiming through or under him, shall have power to *recover* the same, nor to make any release or discharge thereof." [*Parke*, J. So in the old act (b); and it

(a) 1 Barn. & Adol. 568.

(b) 13 *Eliz.* c. 7, s. 11, confirmed by general words, by 1 *Jac.* 1, c. 15, s. 13, and 5 *Geo.* 2, c. 30, s. 26, but without specifying (as in

that statute) what should pass by the commissioner's assignment, with reference either to the nature of the property or to the period of its acquirement.

has been decided over and over again, that an uncertificated bankrupt has a title to after-acquired property, good against all but the assignees.] There is this distinction between the old act and the new; that in the old the provision is, "that if any person or persons which is or shall be published and declared to be a bankrupt by virtue of this act, shall at any time after purchase any lands, tenements, hereditaments, free or copy, offices, fees, *goods or chattels*, or that any lands, &c. shall descend, revert, or *by any means come* to any such person or persons, being bankrupts as is aforesaid, before such time as their debts due to their creditors shall be fully satisfied and paid, or otherwise agreed for, that then the said lands, &c. shall by virtue of this act, by the said commissioners to be appointed as is aforesaid, or the major part of them, be bargained, sold, extended, delivered and used for and towards the payment of the said creditors, in such like manner and form as other the lands, &c. of the said bankrupts, which they had when they were declared first to be bankrupts, should or might have been bargained, sold, disposed of or used by virtue of this act."

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PARKE, J.—The operation of the two enactments is the same.

Per CURIAM.—This rule must be made absolute to enter a verdict for 64/.

Rule absolute.

HEYDON v. THOMPSON, Gent. one &c.

ASSUMPSIT upon a bill of exchange. The first count was upon a bill for 50/., drawn on 1st June, 1831, payable at six months after date, by one *Eldred* on the defendant, To an action against the acceptor of a bill of exchange, the defendant pleads an alteration vitiating the bill. The plaintiff replies (by way of new assignment) that the bill sued on was drawn as declared upon, and is a different bill from that mentioned in the plea. The defendant rejoins the same alteration in the bill mentioned in the new assignment. The plaintiff cannot in his surrejoinder take issue upon the identity of the bill mentioned in the rejoinder with that mentioned in the replication and declaration, and conclude to the country.

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and accepted by the defendant, and indorsed by *Eldred* to *Silver*, and by *Silver* to the plaintiff. There were also the money counts.

To the first count the defendant pleaded, that he had, for the accommodation and at the request of *Eldred*, without any good or valuable consideration whatsoever, subscribed his name to a qualified acceptance, according to the form of the statute<sup>(a)</sup>, upon a piece of blank paper, having a 3s. 6d. stamp thereon, and in which qualified acceptance he had expressed that he made the same payable at a banker's house, namely, at Messrs. *Barclay* and Co. bankers, Lombard Street, *only*, and not otherwise or elsewhere; that he immediately delivered the said piece of paper to *Eldred*, for the purpose of his drawing thereon a bill of exchange for 50*l.*, payable at nine months after the date thereof; that *Eldred* then made and drew upon the said paper so written upon and stamped, a writing purporting to be a bill of exchange for 50*l.*, payable *six* months after date, and then and there, without any good or valuable consideration, indorsed and delivered the supposed bill of exchange in the plea mentioned, (the same being the supposed bill of exchange in the said first count of the bill mentioned,) to *Silver*; and that *Silver*, without any good or valuable consideration, indorsed and delivered the same to the plaintiff. Averment: that at the time of the supposed indorsements so respectively made, *Silver* and the plaintiff knew that the defendant had not received any good or valuable consideration whatsoever, and that the paper so written upon and stamped had been delivered by the defendant to *Eldred* for the purpose aforesaid, and that the writing by *Eldred* on the said paper so stamped and written upon, was made by *Eldred* after the defendant had so written his name and qualified acceptance.

To the second count the defendant pleaded a set-off for money lent, money paid, &c.

Replication.

Replication (in the nature of a new assignment) to the first plea, *precludi non*, because the bill mentioned in the

(a) 1 & 2 Geo. 4, cap. 78.

first plea is not the same identical bill in the said first count mentioned, but another and a different bill of exchange, for that the bill of exchange mentioned in the said first count was and is a bill of exchange drawn on the 1st June, 1831, by *Eldred* on defendant, for 50*l.*, payable six months after date, and which bill of exchange was and is accepted by the defendant generally, and the defendant never did accept the same in any qualified manner, expressing that he made the same payable at a banker's house, or any other place, only, and not otherwise or elsewhere; and which last-mentioned bill of exchange was and is another and a different bill of exchange than the bill of exchange in the first plea mentioned. Verification, and prayer of judgment. Upon the second plea the plaintiff took issue.

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To the new assignment the defendant pleaded a plea Rejoinder.  
 precisely the same as that which he had pleaded to the first count of the declaration, and he joined issue upon the replication to the second plea.

The replication to the plea to the new assignment alleged, that the bill of exchange in that plea alleged to have been made and drawn upon the said piece of paper therein mentioned, was not nor is the said bill of exchange above newly assigned as aforesaid, in manner and form as the defendant hath above alleged, but was and is another and a different bill of exchange; concluding to the country. Surrejoinder.

To this replication the defendant demurred, and assigned Special demurrer.  
 for causes of demurrer, first, that the second new assignment does not state how or in what manner the bill of exchange therein mentioned was and is another and different bill of exchange from the bill of exchange in the plea to the first new assignment mentioned; secondly, that the second new assignment is general, vain and idle in this, to wit, that it attempts to confess and avoid the plea to the first new assignment, and yet it doth not allege and shew some other bill of exchange as being the identical bill of exchange upon which the plaintiff hath above in his first new assignment declared; thirdly, that it attempts to traverse the iden-

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tical mode of the acceptance, making and indorsement, with notice thereof of the bill of exchange set forth in the plea to the first new assignment; whereas the plaintiff ought to have traversed and put in issue the existence and substance thereof, or to have newly assigned some other bill of exchange as that upon which the plaintiff has declared in the second new assignment; fourthly, that although it attempts by reference to set forth another bill of exchange, yet it does not conclude with a verification and prayer of judgment, but to the country; which method of tendering issue precludes the defendant from offering a new and material answer to the second new assignment; fifthly, that although the second new assignment states that the bill of exchange in the plea to the first new assignment mentioned, is not the same bill of exchange as in the first new assignment mentioned, yet the second new assignment does not, according to the rules of good pleading, conclude with a verification; sixthly, that it attempts to traverse and put in issue matter of inducement; seventhly, that although the plaintiff by the second new assignment has abandoned his first new assignment, because it fully answered the plea, yet he attempts to put in issue irrelevant matter not in controversy; and that it does not directly confess and avoid the matter in the plea to the first new assignment; is argumentative and not issuable; and although it contains new matter upon which an issue in fact might be taken, does not conclude with a verification. Joinder in demurrer (a).

Argument for  
defendant.

*Mansel*, in support of the demurrer. The points of argument as to the replication to the plea to the first new

(a) The plaintiff had formerly replied that the supposed bill set forth in the plea, was not the bill set forth in the declaration. To this replication the defendant demurred specially, and the demurrer was argued by agreement before

Mr. Justice *Patteson*, in the bail court. *Steer*, for the plaintiff, and *Mansel*, for the defendant.

Judgment was given for the defendant, with liberty to the plaintiff to amend, which he did by new-assigning, as above stated.

assignment are, 1st, that the new assignment does not set forth at large the bill of exchange newly assigned; and 2dly, that it ought not to conclude to the country, but with an averment. A former new assignment, precisely similar to this, came before Mr. Justice *Patteson* in the Practice Court. [*Parke, J.* There are not two new assignments. That which you call the second new assignment, is only a replication to the defendant's plea to the new assignment.] The plea is argumentative; *Sprigg v. Neal* (a), *Freeston v. Crouch* (b), *Freeston v. Stanford and others* (c), *Pratt v. Groome* (d), *Odiham v. Smith* (e). A short precedent is to be found in *Chitty on Pleading* (f). *Bourne v. Taylor* (g). In this case the plaintiff states, that by and in the most general manner, that the bill of exchange newly assigned is a different bill of exchange from that which the defendant has attempted to answer. [*Parke, J.* Is not your plea altogether bad? It has no connection whatever with the declaration. Your defence to an action on a bill is, that there was another bill between the same parties.] The plea contains these words, "the same being the supposed bill of exchange in the said first count of the bill mentioned." Suppose there were six bills of exchange between the same parties, of the same amount and of the same date, and an action was commenced upon the first, describing it generally, the defendant in his plea might have set out the second bill, and then the plaintiff must have simply new assigned and set out and identified the particular bill upon which the action was brought. The material question is, whether the second new assignment is good in law. In the first place, it does not set out the bill properly; it should have been set out fully, as in a declaration; and secondly, it is not properly concluded. The case may be rested upon the decision of Mr. Justice *Patteson* (h).

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|---------------------------------------------------------------------|--------------------------------------------|
| (a) 3 Levinz, 92.                                                   | (e) 1 Wms. Saund. 300, n.; Cro. Eliz. 589. |
| (b) Cro. Eliz. 492.                                                 | (f) Qu. Vol. iii. 1237, 5th ed.            |
| (c) 1b. 355.                                                        | (g) 10 East, 189—204.                      |
| (d) 15 East, 235; <i>Wentworth</i> on Pleading, vol. iii. 108, 131. | (h) <i>Ante</i> , 406, (a).                |

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Argument for  
plaintiff.

*Erle*, contrâ. If the bill be as is alleged by the defendant, and the plaintiff is obliged either to deny the bill, or to new-assign and conclude with a verification, as often as the defendant pleads a defence relating to a different bill from the one declared on, it will lead to great inconvenience, and the pleadings may be continued to a most absurd extent in cases where there have been many bill transactions between the same parties. The plaintiff, as he had a right to do, has put in issue one of the material facts alleged in the plea, namely, the identity of the bill in the plea with the bill in the new assignment. There certainly are cases in which it is said, that where the plea consists of two dependent facts, of which one only is denied, the replication must conclude with a verification (*a*); *Baynham v. Matthews* (*b*), *Smith v. Dovers* (*c*). But in *Hedges v. Sandon* (*d*), where these authorities were much pressed on the Court, it was decided, that the conclusion of the replication in such a case might be either with a verification or to the country; and therefore the replication here, denying one material fact in the defendant's plea, properly concluded to the country. In *Calvert v. Gordon* (*e*) an attempt was made in some degree resembling the present, and there was a special demurrer on some of the grounds here relied on; but the Court held the conclusion to the country

(*a*) i. e. with a prayer of judgment, which is usually preceded by a verification. A verification, however, is neither necessary nor proper in the absence of any affirmative allegation to which it can apply. Thus a plea of the statute of limitations, or of no cause issued, &c. ought not to conclude with a verification, i. e. an offer to prove these negative allegations, though such verification is frequently inserted. The rule is thus laid down by Lord Coke:—"Counts, or such as be in nature of counts, as an avowry, wherein the defendant is an actor, (as to

which, see also *Brett v. Rigden*, Plowd. 342; *Throckmerton v. Tracy*, *ibid.* 163, and the authorities cited in the margin of that case;) need not be averred, but all other pleas in the affirmative ought to be averred, et hoc paratum est verificare, &c.; but pleas merely in the negative ought not to be averred, because a negative cannot be proved." And see 3 Tho. Co. Litt. 433, note.

(*b*) 2 Stra. 871.

(*c*) 2 Dougl. 428.

(*d*) 2 T. R. 439, 442.

(*e*) 1 Mann. & Ryl. 407; S. C. 7 Barn. & Cressw. 809.

proper. In cases of Pleas of Judgments recovered, the replication denies the identity of the causes of action mentioned in the plea with those declared on, and such replication, according to the authorities, properly concludes to the country: *Seddon v. Tutop* (a), *Lord Bagot v. Williams* (b), *Kitchin v. Campbell* (c). In the present case the defendant cannot allege that he mistook the bill mentioned in the new assignment for the bill mentioned in the plea, because the new assignment stated that the bill declared on was accepted generally; whereas the plea related to a bill accepted specially, viz. payable at Barclay's only, still the defendant again repeats a defence relating to a bill accepted specially in answer to a new assignment specifying a bill accepted generally.

*Mansel* in reply. The plea of a former judgment recovered must conclude with a verification. (*Mansel* was here stopped by the Court.)

DENMAN, C. J.—The Court are disposed to give both the plaintiff and the defendant leave to amend.

PARKE, J.—I think the plaintiff is wrong in his replication to the plea to the new assignment. If there really was no such bill as that mentioned in the plea, the plaintiff in his replication should have denied the existence of any such bill; if there was such a bill, the plaintiff should have newly assigned and given the defendant an opportunity of answering.

TAUNTON, J.—I have had considerable doubt upon the subject, but I am now fully satisfied that the plaintiff must amend.

PATTESON, J. concurred.

Leave given to the plaintiff to amend (d).

(a) 6 T. R. 607.

(b) 5 Dowl. & Ry. 87; 3 Barn. & Cress. 235.

(c) 3 Wils. 304.

(d) The plaintiff having amended accordingly, the defendant again demurred; *vide post*.

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RIPPINGALL, Clerk, v. LLOYD, Esq.

Where a vendor covenants to deduce a good title at A., B. or C., on or before a certain day, a plea that he was ready to deduce a good title at that time, without averring notice to the covenantee at which place he would be ready to deduce such title, is insufficient.

So, a plea that by a subsequent agreement, not under seal, made before breach, the time for deducing such title had been enlarged, and that the defendant was ready to deduce such title within the enlarged time.

So, a plea that in consideration the defendant would deduce a good title and convey, (after breach,) plaintiff agreed to accept such title and conveyance at a later day.

Covenant to deliver abstract,

**COVENANT.** The declaration stated, that by articles of agreement under seal, between the plaintiff and the defendant, bearing date the — Oct. 1830, the defendant covenanted with the plaintiff to sell to the plaintiff the fee simple of the manors of Tentney and Ashwood, in the county of Norfolk, with certain other freehold and leasehold property, for 21,020*l.*; and before the 30th day of October then instant, at his own expense, to make and deliver unto the plaintiff or his agent, an abstract of the defendant's title to the manors and premises; and on or before the 30th day of November then next, to deduce and shew forth a good and clear title thereto; and on or before the 8th day of January then next, on receiving the said sum of 21,020*l.*, to execute the proper conveyances for conveying the fee simple of the said manors and premises to the plaintiff and his heirs, and the absolute interest in the said leasehold premises to him and his assigns; and it was by the said articles of agreement further covenanted, that the said conveyances should be prepared by and at the expense of the plaintiff. Averment that upon the 8th of January the plaintiff was ready to accept a proper conveyance at his own expense, upon having a good title shewn. Breach, first, that the defendant did not, on or before the 30th day of November, or at any time since, deduce and shew forth or make a good title to the said manors and premises. 2dly. That the defendant, and all proper necessary parties, would not, on or before the said 8th day of January, or at any time since, execute a proper conveyance for conveying the said manors and premises as aforesaid.

The defendant craved oyer of the articles of agreement; which were set out, and which, after stating the contract to sell for 21,020*l.*, contain the following covenant:—"That he the said *John Lloyd* will, on or before the 30th day of October instant, make and deliver unto the said *S. F. Rippingall*, or his agent, an abstract of the title of the said *J. L.* to the said manors and premises, and will, on or before the

30th day of November next, deduce and shew forth a good and clear title thereto, and to every part thereof, to the said *S. F. R.*; and also that the said *J. L.* and his heirs, and all other necessary parties, will, on or before the 8th day of January next, on receiving the said £1,020*l.* from the said *S. F. R.*, his heirs, executors, &c. execute a proper conveyance or proper conveyances for conveying and assuring the fee simple and inheritance of and in the said manors, &c. unto the said *S. F. R.*, his heirs and assigns for ever; and also for conveying and assuring the remainder of the said leasehold premises unto the said *S. F. R.* and his assigns."

And the following covenant:—"That the said conveyances shall be prepared by or at the expense of the said *S. F. R.*; and further, that if the said *J. L.* shall not deliver a full abstract of his title to the said several hereditaments and premises to the said *S. F. R.* or his agent, before the said 30th day of October instant, and shall not verify the same by the production of all the deeds, evidences and writings, in support thereof, to the said *S. F. R.*, at Norwich, at Lynn, or in London, before the said 30th day of November next, and shall not deduce and shew forth a good and marketable title to the said several hereditaments and premises, on or before the said 30th day of November next, and shall not on or before the said 8th day of January next, by himself, and all other proper and necessary parties, have executed the said conveyances, at Norwich, at Lynn, or in London, and have delivered the same to the said *S. F. R.*, on receipt of the said purchase money, then and in any of the said cases, and immediately after the said 30th day of October, or the said 30th day of November, or the said 8th day of January, as the case may be, this present agreement shall be utterly void to all intents and purposes whatsoever, and the jurisdiction of equity wholly barred."

Fourth plea: (to first breach,) that the defendant did, before the 30th day of November next after the making of the said articles, by his agent in that behalf, (an abstract of the title of the defendant to the said manors and premises having been theretofore delivered by the defendant to the

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to deduce  
good title,  
and to convey.Covenant (or  
proviso) for  
avoiding sale,  
upon default  
of vendor.Fourth plea:  
That defend-  
ant deduced  
good title to  
part, and was  
ready to de-  
duce good title

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to remainder,  
but plaintiff  
would not  
attend.

plaintiff,) produce and shew forth unto the agents of the plaintiff in that behalf, divers deeds, &c. in part deducing and shewing forth a good title to the said manors and premises; and that the defendant afterwards, until and upon the said 30th day of November, was ready and willing, by his agents in that behalf, to produce and shew forth unto the plaintiff, or his agents in that behalf, divers other deeds, completing the deduction of such title as last aforesaid, and would on or before the said 30th day of November, have produced such other deeds to the plaintiff or his agents attending for that purpose, according to the form and effect of the said articles of agreement, and of the said covenants of the defendant in that behalf, whereof the plaintiff had notice, but that the plaintiff did not, nor would, on or before the same 30th day of November, by himself or his agent in that behalf, attend or appear for the purpose aforesaid.

Fifth plea:  
Defendant  
deduced good  
title in part;  
time extended  
by agreement,  
for deducing  
title; defend-  
ant willing to  
deduce title  
within extend-  
ed time, but  
plaintiff did  
not attend.

Fifth plea: (to first breach,) that the defendant, before the said 30th day of November, in part deduced and shewed forth a good title to the said manors and premises, and that by certain articles of agreement, bearing date the 6th day of the same month of November, made between the plaintiff and the defendant, the time for deducing and shewing forth such title as aforesaid was extended until the 17th day of December then next following; and that on the 3d day of December, and until the 17th of the same month, the defendant was ready and willing to complete the deduction and shewing forth of such title as aforesaid, and would have completely deduced and shewn forth such title as aforesaid, according to the form and effect of the said articles of agreement in the declaration mentioned, if the plaintiff, by himself or his agent, would have attended and appeared, so that such title might have been so completely deduced and shewn forth, but that the plaintiff did not nor would at any time within such extended time, by himself or his agent in that behalf, attend or appear, to have the same title completely deduced and shewn forth.

Sixth plea:

Sixth plea: that after the said first breach of covenant,

and before the exhibiting of the bill, by another agreement, made between the plaintiff and the defendant, in consideration that the defendant, at the request of the plaintiff, had agreed to deduce and shew forth a good title to the said manors and premises within a reasonable time in that behalf, and thereupon and within a reasonable time to make, or cause to be made, a good and sufficient conveyance, according to the terms of the said articles of agreement in the declaration mentioned, except as to time, the plaintiff agreed to accept such title and conveyance; and that the same agreement should be taken on the part of the defendant, as in substitution of the covenants of the defendant in the said articles of agreement contained in that behalf as to time; that the plaintiff accepted and took the same agreement so entered into between the plaintiff and defendant, in full satisfaction and discharge of the damages by the plaintiff sustained, by reason of the breach of covenant first above assigned, and thereby acquitted and discharged the defendant of and from the said damages; that the defendant was ready and willing to deduce and shew forth, and would have deduced and shewn forth such title as aforesaid, within such reasonable time as aforesaid, and would have made such conveyance as aforesaid, but that the plaintiff did not nor would attend, so that such title might be deduced and shewn forth within such reasonable time.

Eighth plea: (to second breach,) that the defendant, after the execution of the said articles, until and on the said 8th day of January, was ready and willing, with all necessary and proper parties, to execute proper conveyances for the conveying and assuring to the plaintiff as aforesaid, the said freehold and leasehold hereditaments; and that he the defendant, and all other proper and necessary parties would, on or before the same 8th day of January, have executed such conveyances, if the plaintiff would have prepared and tendered such conveyances as aforesaid, but that the plaintiff did not nor would, on or before the said 8th day of January, or at any other time, prepare and tender, or cause to be prepared and tendered, such conveyances.

The plaintiff demurred specially to the fourth, fifth and sixth pleas. To the eighth plea he replied, that the defend-

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After breach, in consideration defendant would make out good title according to original terms, except as to time, plaintiff agreed to accept title at substituted time; defendant ready, but plaintiff did not attend.

Eighth plea: Defendant ready to convey, but plaintiff prepared and tendered no conveyance.

Demurrers and replication.

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ant did not, on or before the said 30th day of November, or on or before the said 8th day of January, or at any time since, although requested, deduce and shew forth a good title to the said manor and premises, as by the articles of agreement he was bound to do; wherefore he the plaintiff did not nor could, on or before the said 8th day of January, or at any time, prepare or tender such conveyances as in the said articles of agreement in the said eighth plea mentioned, as he otherwise would have done.

Rejoinder.

Rejoinder: that although the defendant, since the making of the articles of agreement, and within a reasonable time in that behalf, before 8th January, was ready and willing, and offered to deduce and shew forth, and would have deduced and shewn forth, a good and clear title to the said manors and premises, so that the plaintiff might, on or before 8th January, have prepared and tendered such conveyances as aforesaid, if the plaintiff would have had the title so deduced and shewn forth as aforesaid, whereof the plaintiff had notice: Yet the plaintiff wholly refused to have such title so deduced and shewn forth, and wholly discharged the defendant from so deducing and shewing forth such title as aforesaid.

Surrejoinder.

Surrejoinder: that the defendant, since the making of the articles of agreement, and within a reasonable time in that behalf, before the 8th January, was not ready and willing to and did not offer to deduce and shew forth a good and clear title to the said manors and premises, so that the plaintiff could and might, on or before the said 8th day of January, have prepared and tendered such conveyances as aforesaid; concluding to the country.

General demurrer, and joinder.

*Austin*, for the plaintiff (a). The defendant, by his fourth, fifth and sixth pleas, has not properly excused himself from the performance of the covenant which he has entered into, to deduce a good title to the premises in question; for, in

(a) This case was argued before *Parke*, *Taunton* and *Patteson*, Js. *Denman*, C. J. was absent from Court when the arguments were heard in this case, and in the cases

of *Smith v. Topping*, p. 491, *Hare v. Horton*, p. 488, and *Doe v. Rogers*, p. 550, being in attendance on his majesty in council, and therefore took no part in the judgments.

the first place, the plaintiff was not bound to go to those places at which the remainder of the title deeds were; nor, in the second place, has the defendant fixed by notice upon the place at which he would exhibit the deeds. When a party is to excuse himself from liability in respect of an act to be done in relation to another party, he must shew that he has done every thing in his power with a view of performing that which it was his duty to perform; *Lancashire v. Killingworth* (a). The cases on this subject are collected in a note to *Peeters v. Opie* (b). The covenant in this case is unqualified. [Parke, J. The only question is, whether the covenant is affected by the subsequent part of the agreement, which says, that if the vendor shall not verify the title by the production of the deeds at Norwich, at Lynn, or in London, the agreement shall be void.] This was a stipulation made in favour of the defendant. The deeds were, at the time the contract was entered into, at these three places. This clause did not relieve him from the necessity of giving to the plaintiff notice at which place he intended to verify the title. It might be contended upon the covenant, that even if the defendant had given the plaintiff notice to attend at a particular place, yet the plaintiff would not have been bound to attend, and that therefore if the plea had stated notice and refusal to attend, this would not have been sufficient to excuse the defendant; 1 *Rolle's Abr.* 457, (U) 4, 5, 6 (c); *Com. Dig. Condition* (d). Here, some of the deeds are produced; the rest might have been delivered in the plaintiff's absence; *Stanley v. Hemmington* (e). [Parke, J. In *Sugden on the Law of Vendors and Purchasers of Estates* (f), it is said, "To entitle a vendor to sustain an action for breach of contract, it has been said, that he must shew what title he has, it not being sufficient to plead that he has been always ready and willing, and frequently offered to make a title to the estate."]

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First point:  
Vendee not  
bound to go to  
place where  
remainder of  
title deeds  
were.

Second point:  
Vendor bound  
to give notice.

(a) 1 Comyns's Rep. 116.

(d) L. 5.

(b) 2 Wms. Saund. 352, note 3.

(e) 6 Taunt. 561; 2 Marsh. 276.

(c) 5 Vin. Abr. 256, pl. 4, 5, 6.

(f) 7th edit. 223; 8th ed. 225.

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The fifth plea is bad, as it admits that the covenant was not performed within the prescribed time, and attempts to excuse the non-performance by another agreement not alleged to be under seal; *Blemerhasset v. Pierson* (a), *Rogers v. Payne* (b), *Roe d. Gregson v. Harrison* (c), *Thomson v. Brown* (d). (The counsel for the defendant here intimated that he conceded this point (e).)

The sixth plea is open to the same objection. This plea attempts to vary the terms of an instrument under seal, by parol agreement, which is pleaded as accord and satisfaction. The first agreement must be considered as void and no longer subsisting, to let in the agreement stated in this plea as accord and satisfaction. [*Patteson, J.* referred to the case of *Rede v. Furr* (f). *Parke, J.* The word "void," in the agreement, must be considered to mean "void at the option of the vendee."] The plea is also bad on other grounds. If it is to be considered as a plea of an accord *executory*, it is not averred that the substituted agreement was carried into effect. An accord ought to be shewn to be *executed*. In *Lynn v. Bruce* (g), where *A.* declared, that in consideration that he, at the request of *B.*, had consented and agreed to accept and receive from *B.* a composition of so much in the pound, upon a certain sum of money owing from *B.* to *A.*, in full satisfaction and discharge of the debt, *B.* promised to pay the composition; it was held that this was not a good consideration to support an assumpsit against *B.*, a mere accord not being ground of action. *Peytoe's case* (h), which is referred to by *Eyre, C. J.*, in *Lynn v. Bruce*, goes further, for it is there said, "If the thing be to be performed at a day to come, tender and refusal is not sufficient without actual satisfaction and recompence; *James v. David* (i), *Rayne v. Orton* (k), *Fitch v. Sutton* (l). [*Parke, J.* That was not an action for unliquidated damages, which this is,

(a) 3 Lev. 234.

(b) 2 Wils. 376.

(c) 2 T. R. 425.

(d) 1 B. Moore, 358.

(e) As to which see also *Goss v. Lord Nugent*, ante, 28.

(f) 6 M. & S. 121.

(g) 2 H. Bla. 317.

(h) 9 Co. Rep. 79 b.

(i) 5 T. R. 141.

(k) Cro. Eliz. 305.

(l) 5 East, 230.

and therefore that case does not apply.] *Brown v. Wade*(a), *Lobby v. Gildart*(b). [Parke, J. That was an action upon a bond which had become absolute; this is an action for *unliquidated* damages. It is laid down that an accord with mutual promises to perform, is good. An opinion to that effect was intimated in *Case v. Barber*(c), and the Court has acted upon it in one or two instances.] The reason why an accord is not a defence to an action is, that the plaintiff has no remedy upon the accord. *Case v. Barber* has been overruled; *Allen v. Harris*(d). The plea likewise is bad; as it does not state that the agreement pleaded in accord was in writing, which, as the agreement relates to land, it was necessary to shew; 1 *Wms. Saund.* 276, e; *Com. Dig.* Action of Assumpsit, F. 3(e).

The surrejoinder is not defective. The defendant by his plea excuses his default in not executing conveyances, because, he says, that the plaintiff did not tender them. This is sufficiently answered by the replication that the defendant did not, although duly required, deduce a good title before the specified time. The rejoinder alleges that the defendant was ready and willing, and offered to deduce such good title, so that conveyances might have been prepared and tendered, but that the plaintiff refused to have the title so deduced, and discharged the defendant from so deducing the same. The surrejoinder denies that the defendant was ready or willing, or offered to deduce a title, *modo et forma*. By the demurrer to the surrejoinder the defendant admits that at the specified time he was unable to deduce a good title, and therefore there could have been no tender, and consequently no refusal. Nor could there be any discharge from that which at the time he was disabled from doing.

*F. Kelly*, for the defendant. As to the fourth plea. It

(a) 2 Keble, 851.

1537.

(b) 3 Lev. 55.

(e) Under the title "When it

(c) T. Jones, 138.

does not lie without a memorandum in writing."

(d) 1 Ld. Raym. 124; 2 Lutw.



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is not intended to dispute the principles of law which have been laid down in the cases which have been cited. The whole question turns upon the meaning of the articles of agreement; and in order to see what the defendant is bound to do, it is necessary to look at the whole covenant. The declaration, which sets forth the material parts of the deed with reference to this matter, states three covenants; first, to deliver an abstract before the 30th October; 2dly, to deduce and shew forth a good title to the premises on or before the 30th November; and thirdly, on or before the 8th January, upon receipt of the purchase money, to execute conveyances. If there was a single act to be done by the defendant, as the delivery of an abstract, which could be done as well in the plaintiff's absence, by delivery at his dwelling-house, as in his presence, this would have fallen within the principle of the cases cited. The nature of the transaction however, it is evident, requires the presence of the other party. The defendant could not deduce and shew forth good title, unless the plaintiff or some one on his behalf attended. The usual course is, in the first place, to deliver an abstract; objections are then made, and the production of certificates and other documents required. The deeds are then to be compared with the abstract. This cannot be done without the presence of the vendee or his agent. The vendor is not bound actually to tender the deeds; it is sufficient if he give notice that he is ready and willing to produce them, *pursuant to the effect of the covenant*, and this the defendant has done in his plea. [*Taunton, J.* In your plea you do not say to which of the three places mentioned in the covenant the plaintiff was to come. How was he to know where to find you?] The Court will not require upon the plea, allegations of all the minute circumstances attending the performance of the covenants. The title deeds may have been distributed in all the three places. [*Taunton, J.* It cannot be necessary that a vendee should here distribute himself into as many different places as may contain some one or more of the title deeds. If that were so, he might have to go to a hundred different

places.] The deeds are often in possession of third persons, who are bound by covenant to produce them. This covenant does not import that the deeds are to be delivered to the party requiring the production of them, so as to change the custody, but merely that the vendee is to be ready to produce them for inspection. The usual course is for the vendor to take examined copies and give them to the vendee, who then may go to inspect the original deeds in the hands of the party bound to produce them. [*Taunton, J.* The covenant to produce is with the party who is now become the vendor. If the vendee went to inspect the deeds, the holder might refuse to produce them to him, and would not be liable to an action of covenant for the non-production.] Were a covenant of this sort to be construed to be a covenant by the vendor to produce the deeds himself, it would be impossible to fulfil the covenant when the deeds are in the hands of a third party. [*Parke, J.* If a vendor be in that situation, he should take care to qualify his contract. If the covenant to deduce a good title be absolute and unconditional, it must have this construction. In your notice you should certainly have gone further, and have said that you were unable to produce all the deeds at any one place, and that they could respectively be seen at Norwich, Lynn, and London.] In practice, that which has been done here is the ordinary course. [*Parke, J.* We are here upon a question of strict law, arising upon demurrer.] That strict law will be construed with reference to the practice. [*Taunton, J.* The law supposes that every vendor has the deeds in his own hands, and in his power to produce (d)]

(c) The seller is bound to produce the deeds in order that the abstract may be examined with them; although the purchaser is not to be entitled to the custody of them. If they are in the possession of a third person, the purchaser sends to the place where the deeds are, and the seller pays

the expense of the journey; Sugd. Vend. & Purch. 8th ed. 387, citing *Shurp v. Page*, at the Rolls, 1815, and the decision of a Master in Chancery, upon a reference under a bill for a specific performance. And see *Rawlins v. Vincent*, Carthew, 124.

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Sixth plea.

As to the sixth plea, the objection that the argument which is pleaded by way of accord and satisfaction is not in writing, is matter of special demurrer. [*Parke, J.* I would recommend you to amend this plea, if you think you can make any thing of it. It is quite clear that you are wrong now. *Patteson, J.* Do not suppose that the Court consider that you will certainly be right when the amendment is made.]

As to the surrejoinder, the defendant is entitled to a judgment on the second breach assigned in the declaration, which states the non-conveyance on or before the 8th January, 1828. The articles of agreement provide that the conveyance shall be prepared at the expense of the plaintiff. The eighth plea states the readiness of the defendant to convey according to the covenant, but that the plaintiff never tendered any conveyance for execution. The replication to this plea substitutes an entirely new cause of action, alleging that the defendant did not, on or before the 8th January, 1828, deduce a good title, wherefore the plaintiff could not tender a conveyance for execution. The plaintiff's remedy is upon the former breach. He cannot recover for not executing a conveyance, without himself tendering one for execution. [*Parke, J.* This seems to be an answer to the second breach, because the plaintiff has not done that which was a necessary preliminary to the execution of a conveyance by the defendant.]

*Austin*, in reply. If the replication be a departure from the declaration, or if it tender an immaterial traverse, the fault can only be taken advantage of by special demurrer.

**PER CURIAM.**—Judgment for the plaintiff upon the demurrers to the fourth and fifth pleas, and leave given to the defendant to amend the sixth plea (a), by stating the

(a) In Hilary term, 1834, *Austin* obtained judgment from *Parke, J.* in the bail court, upon the demurrer to the sixth plea, on an

affidavit stating that the defendant's attorney had informed the plaintiff's attorney that no amendment would be made.

agreement to have been in writing. Judgment for the defendant upon the pleadings on the second breach(a):

(a) The judgment would not purport to be founded on the insufficiency of the surrejoinder, (although that is the issue of law raised for the determination of the Court by the demurrer and joinder,) but upon the insufficiency of the replication to the eighth plea, which rendered the sufficiency or insufficiency of the rejoinder and of the surrejoinder immaterial; see *Adney v. Vernon*, 8 Lev. 243; *Jose v. Mills*, 6 Mod. 15. And see *Piggott's case*, 5 Co. Rep. 29 a; *Dr.*

*Bonham's case*, 8 Co. Rep. 120 a; *Turnor's case*, ib. 133 b; *Meriel Treskam's case*, 9 Co. Rep. 110 b; *Foster v. Jackson*, Hob. 50; *Woodward v. Robinson*, 1 Stra. 302; *Anon.* 2 Wils. 150; *Le Bret v. Papillon*, 4 East, 502; *Bates v. Cort*, 3 Dowl. & Ry. 676, and 2 Barn. & Cressw. 474; *Thomas v. Heathorn*, 3 D. & R. 647, and 2 B. & C. 477; Com. Dig. *Pleader*, (M. 1, 2, 3); *Bac. Abr. Plead and Pleading*, (A); 1 Wms. Saund. 283, n. 5; *Stephen on Pleading*, 2d ed. 176.

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### SMITH v. TOPPING.

**TROVER** to recover the value of three pipes and three hogheads of wine. Plea: not guilty. At the trial before *Alderson, J.*, at the York spring assizes, 1833, a verdict was found for the plaintiff, damages 700*l.*, subject to the opinion of this Court upon the following case:

The plaintiff, who is a merchant at Hull, was the true owner of the wine. The defendant is the assignee of *Robert Lundie*, who, before his bankruptcy, was a wine-merchant at Hull. For some time previously to the 21st July, 1831, the wine had been deposited by the plaintiff in the cellars of *Lundie*, and was and remained in his possession as the reputed owner thereof, with the consent and permission of the plaintiff, the true owner thereof, within the 72d section of the Bankrupt Act (a), until

If *A.*, the true owner of goods in the order and disposition of *B.*, demand them from *B.* before an act of bankruptcy, they will not pass to *B.*'s assignees under 6 Geo. 4, c. 16, s. 72.

(a) 6 G. 4, c. 16, s. 72, which enacts, "that if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order or disposition, any goods or chattels whereof he

was reputed owner, or whereof he had taken upon him the sale, alteration or disposition, as owner, the commissioners shall have power to sell and dispose of the same, for the benefit of the creditors under the commission."

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the demands hereinafter mentioned, and also until the time of *Lundie's* bankruptcy, unless the Court shall be of opinion that these demands determined such consent and permission. On the said 21st day of July, intelligence having reached Hull that certain persons with whom *Lundie* was supposed to be involved in bill transactions, had stopped payment in London, *Hare*, a clerk of the plaintiff's, (he himself being absent from home,) went to *Lundie's* house about a quarter past eleven in the morning, and demanded the wine from a clerk called *Hunter*, (*Lundie* being from home). *Hunter*, after consulting with *Lundie's* sister, who lived in his house, refused to deliver the wine until his master's return. Soon afterwards *Lundie* returned, and about one o'clock on the same day *Hare* called again at the house and saw *Lundie* himself, and required the plaintiff's wine to be delivered up to him (*Hare*). *Lundie* said, "It is an unfortunate affair, I fear it will go to a bankruptcy, and I do not know how I can act without consulting my attorney, but to give up the wine would be shewing an undue preference." *Hare* said, "We are not creditors. The wine was not sold to you." *Lundie* went away for a few minutes, and upon his return said, that he would not deliver up the wine. On Friday, the 22d July, at nine o'clock in the morning, *Lundie* committed an act of bankruptcy, upon which a commission afterwards issued out, and he was duly declared a bankrupt, and the defendant appointed his assignee, who thereupon took possession of the wine in question. Previously to the commencement of this action, viz. on the 7th January, 1832, a demand was made by the plaintiff upon the defendant to deliver up the wine, and he refused to do so. The plaintiff, as before stated, was absent from home when the demand of the wine was made by *Hare*. *Hare* had then been thirteen years in the plaintiff's service. The plaintiff lived in the country, and was frequently from home. In his absence *Hare* transacted his business, opened his letters and answered them, having the plaintiff's authority so to do, but did not sell goods, or

draw or indorse bills of exchange for him, nor was he empowered to do so. He saw the plaintiff the week after the demand of the wine, and told him of it, and he approved of his having done so.

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The question for the opinion of the Court is, whether the demand made upon *Lundie*, for the delivery of the wine, upon the 21st July, prevented it from passing to the defendant (his assignee), by virtue of the 72d section of the Bankrupt Act (a). If the Court shall be of opinion that the demand had this effect, a verdict is to be entered for the plaintiff for the value of the wine, on the 21st July, 1831, to be ascertained by an arbitrator appointed for that purpose. But if the Court shall be of a contrary opinion, a nonsuit is to be entered. And it is agreed that the Court shall be at liberty to draw any conclusion from the facts stated, which a jury ought to have drawn (b).

*S. Martin*, for the plaintiff, was stopped by the Court.

*Tomlinson* contra. The question which arises in this case is, whether the clerk of the plaintiff had authority to demand these goods from the bankrupt. He had no previous authority. To a certain extent and in certain cases, a subsequent ratification by the principal of an act done, will have the same effect as a previous authority. The ratification here was occasioned by the circumstances which had intervened. If *Lundie* had not become bankrupt, it is very probable that the plaintiff would not have ratified the act of his clerk in demanding the wine. In the interim between the demand and the ratification, the rights of third parties intervened. [*Parke, J.* We cannot consider the clerk as a person having no authority. *Taunton, J.* The words in the case are, that in the plaintiff's absence, *Hare* "transacted his business," which are very large words.]

(a) *Ante*, 421.

(b) This last clause seems to be added *ex abundanti cautela*, as in

a special case the court is substituted for the jury; *secus* upon a special verdict.

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Several exceptions are engrafted upon *Have's* authority. With reference to goods it was very limited, scarcely anything. Assuming, however, that *Have* had authority from the plaintiff to make the demand, yet that does not prevent the right of the assignees to the goods from attaching. If *Darby v. Smith* (a) be still law, it is conclusive in favour of the defendant. In that case the goods were in the possession of the bankrupt the day before his bankruptcy; the owners of the goods then repossessed themselves of them. This was considered fraudulent, and the assignee of the bankrupt was held to be entitled to the goods, under 21 Jac. 1, c. 19. As to the time of repossession, that is precisely this case; Lord *Kerzon* says, "the trustees suffered the bankrupt to have the possession, order and disposition" of the goods, down to the time of the bankruptcy, and therefore the case falls within the very words as well as the meaning of the statute; and the assignee is entitled to the possession of the goods. *Darby v. Smith* has been shaken by subsequent decisions (b), but is recognized in *Ex parte Smith* (c). [*Parke, J.* I must say I thought that no part of the bankrupt law was more clearly settled than this, that the goods must remain in the order and disposition of the bankrupt down to the time of committing the act of bankruptcy.] In *Ex parte Smith, Leach, V. C.*, after referring to *Darby v. Smith*, seemed to take this view of the question, that if the goods were removed in contemplation of bankruptcy, such a removal would be fraudulent, and could not alter the possession; but that if the removal were not made in contemplation of bankruptcy, it might be done the moment before the bankruptcy takes place, and the property removed would not, in such case, pass to the assignees. [*Parke, J.* The Vice-Chancellor seems to have thought *Darby v. Smith* a case of fraudulent preference.] The words used by the Vice-

(a) 8 T. R. 32; *Caffrey v. Darby*, 6 Ves. 488, 491, 4, S. C. 215, 233, 6; *Jones v. Dwyer*, 15 East, 21, 24; *Cullen, B. L.* 295.

(b) Vide *Horn v. Baker*, 9 East, (c) *Buck's Bankruptcy Cases*, 149.

Chancellor, when speaking of that case, are, "*withdrawn in contemplation of bankruptcy.*" The distinction which he takes is supported by analogy to the case of a fraudulent preference.

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PARKER, J.(a).—This is a very clear case. It is now perfectly settled and established, that assignees are not entitled to any thing under the 72d section of the Bankrupt Act, *unless the bankrupt, at the time he became bankrupt, had the possession of the goods of which he was reputed owner, by the consent and permission of the true owner.* Here, the goods were in the possession of the bankrupt until a short interval before the bankruptcy, with such permission. On the day before the bankruptcy, *Hare*, the plaintiff's clerk, who it appears transacts his business in his absence, applies at the bankrupt's office for a return of the wine, and meets with a refusal from the bankrupt's clerk, the bankrupt himself being then absent. On the same afternoon, *Hare* repeats the demand to the bankrupt himself, and is refused. Therefore it is quite clear that at the time of the bankruptcy, which took place on the following morning, the bankrupt had not the possession of the goods *with the consent and permission of the true owner.* Supposing that *Hare* was not properly authorized at the time, yet a party may bring trover in respect of a demand by a person acting as his clerk, and a refusal by the party, who would thus be assuming a right of property over the goods. I think we must take it that there was full authority in *Hare*, and therefore the demand made by him was as effectual as if it had been made by the master.

TATNTON, J. and PATTERSON, J. concurred.

Postea to the plaintiff.

(a) Denman, C. J. was absent from Court.



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## SMART v. HUTTON.

Trespass lies against a sheriff for an arrest made by an officer by color of a warrant under a fi. fa.

**TRESPASS** for assault and false imprisonment. Plea: not guilty. At the trial at the last Spring assizes for the county of Lincoln before *Denman, C. J.*, it appeared that the defendant was sheriff of Lincolnshire, and that the action was brought to recover compensation for an injury done to the plaintiff by the sheriff's officer. A warrant upon a fi. fa. was directed to one *Woodroffe*, a sheriff's officer, to levy 16*l.* 0*s.* 6*d.* *Woodroffe* made a levy accordingly upon the defendant's goods; and shortly afterwards received notice that the landlord claimed a sum of 35*l.* for a year's rent. The goods were sold; but the proceeds of the sale amounted only to the sum of 30*l.* 11*s.*, which was not sufficient to satisfy the claim of the landlord. Upon this, *Woodroffe*, without any further authority, arrested the plaintiff, and carried him to gaol, where he remained about twenty days.

It was objected on the part of the defendant, that he was not liable for the conduct of his officers under these circumstances. In answer to this objection, *Ackworth v. Kemp* (a) and *Sturmey v. Smith* (b) were cited. The learned judge being of opinion that those cases were distinguishable from the present, directed the plaintiff to be nonsuited.

In Easter term last, *Humfrey* obtained a rule nisi to set aside the nonsuit and for a new trial.

*Adams, Serjt.* now showed cause. There must be some limit to the doctrine, that the sheriff is in all cases to be identified with his officer. The officer in this case acted entirely without authority from the sheriff, and with the grossest ignorance. It was contended at the trial, that the sheriff was liable for the whole of the period that the defendant was confined. If a sheriff is to be liable for the act

(a) 1 Dougl. 40, 43.

(b) 11 East, 25.

of a gaoler, where he has no authority at all for his act, there will be no limit to the responsibility of the sheriff. The true distinction is taken in *Rolle's Abridgement* (a). Si home soit arrest per les bailies del vicount, et sur ceo il monstre al eux un supersedeas a descharger luy, et les bailies ceo refuse et luy detayne apres en prison, il avera faux imprisonment vers les bailies, *et nemy vers le vicount*. There is no difference between that case and the present. Suppose the bailiff acted upon a writ already executed, could it be held that the sheriff was liable? [*Parke, J.* Here, the bailiff receives the writ for the purpose of executing it.] The liability of the sheriff is not to be measured by the ignorance and the stupidity of the bailiff.

*Humfrey* in support of the rule. The chief justice at the trial expressed great doubt upon this question. It is submitted, that for all civil purposes the bailiff and the sheriff are to be considered as one person, and that the sheriff is answerable civilly for all the acts of his officer. Thus, where the bailiff takes the goods of *A.* instead of those of *B.*, where a defendant is arrested after the return day of the writ, where upon a writ issued into one county, the bailiff arrests in another county, and where one person is arrested instead of another, the sheriff is responsible for the act of his officer; *Saunderson v. Baker* (b), *Woodgate v. Knatchbull* (c), *Ackworth v. Kemp* (d), *Parrot v. Mumford* (e); this was the doctrine laid down in the older cases; and the principle has since been recognized in *Balme v. Hutton* in error (f). *Parratt v. Mumford* is expressly in point.

(Here he was stopped by the Court.)

DENMAN, C. J.—The rule must be made absolute.

(a) 2 Roll. Abr. 552, *Trespass*, pl. 10, and 18 Vin. Abr. 458, *Trespass*, pl. 10.

(b) 3 Wils. 309; 2 W. Bla. 832.

(c) 2 T. R. 148.

(d) 1 Dougl. 40, 43.

(e) 2 Esp. N. P. C. 585.

(f) 9 Bingh. 471, 3 Moore & Scott, 1, 1 Crompton & Meeson, 262, S. C.

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PARKE, J.—If the sheriff puts into the hand of his officer a writ, he and the officer are to be considered as one person, for every thing the officer does under colour of that writ.

TAUNTON, J. and PATTERSON, J. concurred.

Rule absolute.

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By the grant of a house all the fixtures pass. *Secus*, where by an enumeration of particular fixtures in the conveyance, an intention is shown to exclude other fixtures of greater value and importance.

Where *A.* executes a deed, and delivers it to *B.* as an escrow, to be delivered to *C.* on a certain event, possession of the deed by *C.* is *prima facie* evidence of the performance of the condition.

**CASE.** The first count of the declaration stated, that certain iron-foundries, machinery, apparatus, and furniture, dwelling-houses, warehouses, shops, yards, and gardens, with the appurtenances, situate &c., and divers, to wit, twenty cranes, twenty boilers, twenty furnaces (and other apparatus, machinery and goods), were in the possession and occupation of one *William Bailey*, as tenant thereof to the plaintiff, the reversion belonging to the plaintiff: yet the defendant well knowing &c., but contriving to injure the plaintiff in his reversionary estate and interest of and in the said iron-foundries &c. &c. whilst the same were so in the possession of *Bailey* as tenant thereof, and whilst the plaintiff was so interested therein as aforesaid, to wit, on &c., wrongfully and unjustly, without the leave or licence of, and against the will of the plaintiff, broke and entered the said iron-foundries &c., and tore up, broke down, broke to pieces, protrated and destroyed the same, and then and there seized, took and carried away; and afterwards, on the day and year aforesaid, converted to his own use the said machinery &c. which were affixed to the plaintiff's reversionary estate and interest in the said iron-foundry machinery, and scattered and spread the same over with large quantities of bricks, stones, mortar, and rubbish, and continued the same so scattered and spread, greatly injuring the said reversionary estate of the said plaintiff therein thence hitherto. By means of

which several premises the plaintiff hath been and is greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in the said iron-foundry &c. so, in the occupation of *Bailey*, as tenant thereof to the plaintiff as aforesaid (to wit), in the county aforesaid. Second count: trover for the machinery &c. Plea: the general issue.

At the trial before *Parke*, J. at the last Spring assizes for the county of Stafford, the following facts appeared:—

16th November, 1830, the defendant agreed to sell to *Bailey*, and *Bailey* agreed to buy, the fee simple of an iron-foundry, lands, and dwelling-houses, for 4,500*l*. At the same time an agreement was entered into by the same parties for the sale and purchase of the trade, fixtures, fixed machinery, and utensils on the premises; which latter agreement was not ultimately carried into effect. It was afterwards agreed between *Bailey* and the plaintiff that the latter should advance 3,500*l*. of the purchase money, to be secured by mortgage on the premises.

22d February, 1831, by indenture between the defendant of the first part, one *William Spurrier* of the second part, *Bailey* of the third part, and the plaintiff of the fourth part, after reciting, that by certain indentures of lease and release of the 7th and 8th of Dec. 1825, to which *Spurrier* and the defendant were parties, for the considerations therein mentioned, all that iron-foundry, together with the two dwelling-houses, warehouses, shops, yards, gardens, and appurtenances thereto belonging, situate &c., were limited to such uses, and upon such trusts as the defendant by any deed or writing should from time to time appoint; and in default of such appointment, to the use of the defendant and his assigns during his life, with a limitation to the use of *Spurrier*, his executors &c., during the natural life of the defendant, in trust for the defendant and his assigns during his life, with remainder to the use of the defendant, his heirs and assigns; and reciting that the defendant had contracted with *Bailey* for the absolute sale to *Bailey* of the said foundry &c., with their appurtenances, and the fee simple and inheritance thereof in possession, free from incumbrances, at

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4,500*l.*: and reciting that *Bailey* had requested the plaintiff to advance and lend him the sum of 3,500*l.* to enable him to complete his said purchase, which the plaintiff had agreed to do on having the same, together with interest thereupon, secured by way of mortgage upon the said foundry, messuages, lands, and other hereditaments in manner thereafter mentioned: it was witnessed, that the defendant did thereby appoint that the foundry &c. should thenceforth remain and be to the use of the plaintiff, his heirs and assigns; and it was also witnessed, that in pursuance and further performance of the said agreement the defendant bargained, sold, and released, and *Spurrier* at the like request, and by the direction of *Bailey* and the defendant, did grant, bargain, sell, alien, release, and confirm unto the plaintiff in his actual possession &c., *all and singular the said iron-foundry &c.*, then in the occupation of the defendant and the widow *Farley*: and also *all that close, piece or parcel of land or ground called the Foundry Field*, also thereinbefore particularly described (except so much of the said close or parcel of land as the defendant some time since sold and conveyed to *Whitaker*, and which contains by admeasurement 1,430 square yards, or thereabouts), and *the dwelling-houses and buildings erected thereon*, and all and singular other the hereditaments in and by the said indentures of lease and release of the 7th and 8th December, 1825, *together with all grates in and about the said two dwelling-houses and the brew-houses thereto belonging*, and all fruit and other trees growing upon the premises; and all houses, cottages &c., *habendum* to the plaintiff, his heirs and assigns. Proviso, for reconveying to *Bailey* and his heirs upon payment of 4,000*l.* and interest.

28th April, 1831, *Bailey* borrowed of the plaintiff the further sum of 1,500*l.*, which he also charged on the premises.

20th April, 1831, *Bailey* obtained the exclusive possession of the premises and fixtures.

June, 1831, in consequence of a disagreement between the defendant and *Bailey* as to the price which *Bailey*

should pay for the trade, fixtures, machinery, &c., under the second agreement of 16th November, 1830, the defendant entered upon the premises, and severed the fixtures &c. from the freehold, and carried them away. For this taking and carrying away the present action was brought.

The fixtures in question consisted, amongst others, of a steam-engine and boiler, built in brick-work, the cills of which were let into the ground six feet; and of four cranes, of which two were in the foundry and two others in the yard adjoining, all being fixed into the soil by cills of the depth of twelve feet. These, together with other fixtures, machinery and implements, had been used by the defendant in his trade of gasometer and boiler maker.

The deed, after being executed by the defendant *Spurrer* at Birmingham, was delivered to one *Caldecott*, a clerk of the attorney, who attested the execution, to be delivered by *Caldecott* on the completion of the purchase. Upon this it was objected, that the deed had only been delivered as an escrow. The learned judge, however, overruled the objection. It was then further objected, that by the deed the trade, fixtures, machinery, and implements in the foundry, did not pass to the plaintiff; upon which the learned judge nonsuited the plaintiff. Leave was, however, given to the plaintiff to move to enter a verdict for 600*l.*, the amount at which the jury had estimated the fixtures, or for 35*l.* for damages for excessive injury done to the premises in removing the fixtures, or for both these sums.

In Easter term following, *Talfourd*, Serjt. obtained a rule to show cause why a verdict should not be entered for the plaintiff for 600*l.*, 35*l.*, or 635*l.*; against which,

*Maule* and *R. V. Richards* now shewed cause. This case raises three questions; whether the mortgage deed to the plaintiff was delivered as an escrow; whether by that deed the steam-engine, boiler, cranes, and other fixtures in the foundry, were conveyed to the plaintiff; and lastly, whether the declaration is framed so as to meet the de-

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First point:  
Delivery as an  
escrow.

mand for damages for the injury done to the freehold in removing the fixtures from off the premises.

I. The deed was delivered by the defendant *Spurrier* as an escrow only. It is true that in *Comyns's Digest* (a) it is said, "if it be delivered as his deed to a stranger, to be delivered to the party on the performance of a condition, it shall be his deed presently; and if the party obtains it, he may sue before the condition performed." But in *Johnson v. Baker* (b), it was said by the Court that the position in *Comyns* was not correct, and that the case which is cited as an authority for the passage (c) was ultimately decided the other way (d). The circumstance, therefore, of the deed's having ultimately fallen into the hands of the grantee, cannot operate as a delivery. The deed was delivered to *Caldecott* to be delivered by him to the plaintiff upon the completion of the purchase. No betrayal of his trust by *Caldecott* could alter the intention of the parties who had delivered the deed to him.

Second point:  
Construction  
of the deed.

II. Then as to the question upon the construction of the deed itself, the term iron-foundry ought to be entirely laid out of the question. The building had once been used as an iron-foundry, and is now, for that reason, called by that name. In the case *Ex parte Quincy* (e) it was held, that by a mortgage of a brewhouse, the utensils and implements necessary to carry on the business of a brewer did not pass. Whether or not the fixtures did pass, depends upon the construction to be put by the Court upon the whole of the deed. If it was the intention of the parties to convey the fixtures by the deed, it will be the first instance in which parties with such an intention have omitted to specify articles of so much value. It cannot be supposed that the parties intended to pass these fixtures, as they have specifically mentioned fixtures of greatly inferior value, and have left these entirely unnoticed.

(a) Title *Fail.* (A. 3.)and *Roe's case*, 1 Leon. 152.

(b) 4 Barn. &amp; Ald. 440.

(d) Fra. Moore, 300, per nomen

(c) 2 Roll. Abr. 25, l. 30; (13  
Vin. Abr. 24, pl. 3); and *Degory**Degoze v. Rowe.*

(e) 1 Atk. 477.

No rule is better established than this, that where a deed enumerates some fixtures, no other fixtures will pass except they are ejusdem generis, inasmuch as expressio unius est exclusio alterius. [*Patteson*, J. If in a conveyance of three houses, the fixtures of two were mentioned, those of the third would not pass.] This is a stronger case; here the fixtures not mentioned are of the greater value. If there had been a mere conveyance of the iron-foundry, without mention in the deed of any fixtures whatever, it may, perhaps, be conceded that these fixtures would have passed. [*Patteson*, J. There is no doubt that when you convey the freehold, whatever is affixed to the freehold will pass, unless you can collect from the deed that something so affixed was not intended to pass.] It is clear upon this deed that the fixtures in question were not intended to be conveyed. In *Thresher v. The East London Waterworks Company* (a), it seems to be admitted by the Court that evidence, similar to that of the agreement between *Bailey* and the defendant relative to the trade, fixtures, &c., may be received to explain the meaning of the deed. From that agreement, it is manifest that the parties never contemplated that the deed should operate to pass the fixtures, but intended that these should be the subject of a separate arrangement.

III. Upon the last point, assuming that the defendant was entitled to remove the fixtures, the form of the pleadings is not such as to entitle the plaintiff to give in evidence the unnecessary injury done to the building in removing them. The action is brought for the recovery of the fixtures, and the declaration is framed to attain that object only.

Third point:  
Injury to the  
freehold.

*Talfourd*, Serjt. *Cripps*, and *Hoggins*, in support of the rule.

I. As to the first question: the deed is found in the possession of the plaintiff, which shews that the transaction has been completed, and that the condition upon which it was to be given up by the clerk has been performed.

First point.

(a) 4 Dowl. & Ryl. 62; 2 Barn. & Cress. 608.



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Second point.

II. As to the second question, it is said that the term 'iron-foundry' ought to be laid out of the question, for that it was used merely as a name, and not by way of description. There is, however, no ground for such an assumption. This had been a foundry, and might again be used as such, and for this purpose the cranes are a very necessary appendage. Consequently, a conveyance of the foundry would pass the cranes and such other fixtures as are necessary for carrying on the business of the foundry. In *Sheppard's Touchstone* (a) it is said, "the incident, accessory, appendant, and regardant, shall in most cases pass by the grant of the principal, without the words cum pertinentiis." So "*accessorium sequitur suum principale*." It is also said in the same work (b), that by the grant of a mill, the mill-stone will pass, even though at the time of the grant it be actually severed from the mill, because it is a parcel or of the essence of the mill. [*Patteson, J.* It was held in *Place v. Fagg* (c), that by the mortgage of a mill, the stones, tacklings, and implements, passed. It will hardly be disputed as a general proposition, that these fixtures would pass under a conveyance of the foundry by general words; but the question is, whether it is not to be collected from this deed that the fixtures belonging to the foundry were not intended to pass.] With regard to the use which has been made of the maxim *expressio unius exclusio est alterius*, it may be answered, that at the time of this grant, the two dwelling-houses were in the occupation of *tenants*, and consequently the fixtures in them would not pass to the vendee without express words. [*Grymes v. Boweren* (d) shews that the right to fixtures, as between landlord and tenant, stands upon a different footing from that as between vendor and vendee. Here it would not be supposed that the party had a right to the fixtures in houses unless specially named. [*Parke, J.* It does not appear in the deed that the dwelling-houses were in the possession of tenants.] In *Comyns's Digest*, Grant,

(a) Vol. 1, page 89.

(c) 4 Mann. &amp; Ryl. 277.

(b) Ibid. page 90.

(d) 6 Bingh. 437.

(E 3) (a), it is said, "if a man has an house in A., and houses and lands in B., and devises his house in A. to one, and (having demised the houses and lands in D. rendering rent) all these his lands, meadow and pasture, in B. to another, his houses then pass by the word lands, though he mentions his house in A. expressly." If the land, where the foundry stands, had been conveyed and set out by metes and bounds, without the mention of any foundry, that would have been sufficient to pass the foundry, and all the fixtures with it; *Colegrave v. Dias-Santos* (b). These fixtures could not have been seized by virtue of a fi. fa. issued to take the goods of *Bailey*, *Steward v. Lombe* (c); nor if *Bailey* had become bankrupt would they have been in his order and disposition, so as to pass to his assignees; *Horn v. Baker* (d). [*Parke, J.* That went on the ground that the stat. of *Jac. 1* applies only to movable articles.] The *craues* may be considered as "erections and buildings," and as passing by the deed under those terms; *Naylor v. Collinge* (e). *Ex parte Quincy* (f) decided that utensils, not fixed to the freehold, did not pass by a grant of a brewhouse. If that case be taken as an authority for the position, that articles affixed to the freehold do not pass, it has been overruled by *Colegrave v. Dias-Santos*. If it decides that the utensils did not pass because they were not fixed, it is in effect an authority for the plaintiff. From the recital, the intention appears to have been to grant all that had passed by the former deed, and the appointment by the defendant is of all the premises contained in the deed of 1825. It appears clearly from the recital, that all the fixtures were in *Spurrier*, who is only a trustee for the defendant. It cannot be that the defendant intended to convey with a reservation of fix-

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(a) For which is cited *Ever v. Heydon*, 38 *Eliz.* 2 *Roll. Abr.* 57. But afterwards in 41, *Eliz.* the same point was decided otherwise between the same parties, *ib.* 49, 50. And see 1 *Vin. Abr.* 77, pl. 5; *ib.* 106, pl. 8; *Cro. Eliz.* 476; *Palm.* 497; *Godb.* 354.

(b) 3 *Dowl. & Ry.* 256; 2 *Barn. & Cress.* 76.

(c) 4 *B. Moore*, 281; 1 *Brod. & Bingh.* 506.

(d) 9 *East*, 215.

(e) 1 *Taunt.* 19.

(f) 1 *Atk.* 477.

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tures to *Spurrier*, a bare trustee. An inference of law cannot be admitted to contradict the meaning of general words; *Doe v. Jeyes* (a). If the defendant had any title to these fixtures after the sale, he could not, after he had delivered the possession of them to the plaintiff, enter for the purpose of removing them; *Colegrave v. Dias-Santos*, upon the second point. *Abbott*, C. J. there says, "In *Lee v. Risdon* (b), *Gibbs*, C. J. says, speaking of the power which tenants have to remove fixtures, 'unless the tenant uses during the term his continuing privilege to sever them, he cannot afterwards do it; and it never, I believe, was heard of, that trover could be afterwards brought.' According to that opinion, nothing can now be done with respect to those things which may be considered as fixtures, whatever power the plaintiff might have had before he gave up the possession."

Third point.

III. The declaration is framed so as to let in the damage in respect of the manner in which these articles were removed, supposing them to be the property of the defendant, and that he was entitled to remove them. It is in the common form of the precedents in actions on the case for injuries to the reversion. It states a destruction of the whole, yet a proof of an injury to part, and sufficient to support the count. Suppose this had been an action of trespass, and the defendant had pleaded specially that he entered to remove the fixtures, the plaintiff might then have new-assigned excess. In case, the plea of not guilty puts every thing in issue: therefore under it the plaintiff is entitled to prove the unnecessary damage done in removing the fixtures.

Second point  
 (in the argu-  
 ment.)

PARKE, J.—I am of opinion that the rule ought to be made absolute to a certain extent, but not to the full extent. The first question is upon the deed of 1831, whether the fixtures all passed. Upon looking over the whole deed, we are of opinion that they did not. There is no doubt that *primâ facie* the fixtures would pass with

(a) 1 Barn. & Adol. 593.

(b) 7 Taunt. 188.

the freehold; but it seems to me, looking at the terms of the deed conveying the premises, that the intention of the parties was, that they should not pass. Where the fixtures are of so great value, I must say that I think that the parties would have used other words than those which I find here, if it had been contemplated that they should pass. The words of appointment in the deed have reference to the granting part of the deed, which conveys the iron-foundry, together with the said dwelling-house, warehouses, shops, &c. thereto belonging, and also the foundry-field, and the dwelling-houses and buildings erected thereon, "together with all grates, boilers, bells and other fixtures in and about the said two dwelling-houses and the brew-houses thereto belonging." I think it impossible to suppose that, if they had intended the valuable fixtures now demanded to pass, they would have mentioned only such unimportant fixtures as these.

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The next question is, whether the plaintiff is entitled to Third point. succeed as to so much of the rule as calls upon the defendant to shew cause why a verdict should not be entered for 35*l*. When I looked at the declaration at the assizes, and here, at first I thought it by no means framed so as to meet this case, but I now think it sufficient. The real cause of complaint is, that in entering to exercise his right to take away the fixtures, the defendant did so in an improper manner. The allegations in the declaration may be read disjunctively. The declaration states, that certain iron-foundries, machinery, &c., dwelling-houses, &c., divers, to wit, &c. cranes, boilers, furnaces, &c., were in the possession and occupation of *Bailey*, as tenant thereof to the plaintiff, the reversion belonging to the plaintiff. This may be taken as if it had been said that the foundry and houses were in the possession of *Bailey* as tenant to plaintiff, the reversion being in the plaintiff. The next allegation is, that the defendant knowing the premises, but contriving to injure the plaintiff in his reversionary interest in the iron-foundries, machinery, &c. This may also be taken distributively, and as applying only to the foundry and houses.

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So of the allegation, that the defendant broke and entered the iron-foundry, machinery, &c., and tore up, broke down, broke to pieces, prostrated and destroyed the same, and seized, took, carried away and converted to his own use the machinery, &c. This amounts to nothing more than that the foundry and houses were prostrated and destroyed, as the allegation may be limited to them. Then it states an injury to the plaintiff's reversion in the iron-foundry and machinery, which allegation may be also taken distributively. Therefore we may take the declaration as if it had stated an injury to the houses and foundry only. The defence under the general issue was, that the defendant was lawfully entitled to enter for the purpose of removing his property. If this had been pleaded specially, the plaintiff might have new-assigned that more injury was done than was necessary under a careful removal, and such may be taken to be the effect of the declaration. The jury having found that unnecessary damage to the amount of 35*l.* was done, a verdict must be entered for that amount.

First point.

The plaintiff would not, however, be entitled to this verdict if I was wrong as to the admission of the deed in evidence. That which I said was, that although there might be evidence that the deed was delivered as an escrow, possession was *primâ facie* evidence of the condition upon which it was to be delivered to the purchaser having been complied with, and I see no reason for altering this opinion.

Second point  
 (in the argu-  
 ment.)

TAUNTON, J.—Three questions have been raised in this cause: first, as to what passed by the granting part of the conveyance; secondly, whether the declaration is sufficient to warrant a finding of 35*l.* for the unnecessary damage; and thirdly, whether the deed is to be considered as an escrow. Upon the first question I confess I have not been able to entertain much doubt. The granting part of the deed grants all and singular the said iron-foundry, together with the said dwelling-houses, &c.; and also all that close called the Foundry Field, with the dwelling-houses and buildings erected thereon. The fixtures in the iron-foundry, as well

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as those in the dwelling-houses, would have passed under these words, as appears from many decided cases; but when the deed goes on to say, "together with all grates, boilers, bells and other fixtures in and about the said dwelling-houses, and the brewhouse thereto belonging," the express mention of fixtures in dwelling-houses excludes the fixtures in the foundry from passing, for the reason that *expressio unius exclusio est alterius*. The mention of these fixtures shews that it was not the intention of the parties that the fixtures in the iron-foundry, which were of a different kind and much higher value, should pass. In this instrument there is a recital of an agreement for the mortgage upon the iron-foundry, houses, and other hereditaments, from which it appears that the apparatus in the foundry was not intended to form any part of the security, but that it should consist in the real property only.

Upon the second point, the count is almost entirely Third point. silent upon the gist of this action. It is by mere accident that the only cause upon which the plaintiff is entitled to recover comes within the count. It is drawn as if the only cause of action were the taking away of the fixtures; whereas the only cause is, that in taking away these fixtures he did more damage than was necessary. But it so happens that the declaration does contain words which it is impossible to reject. It contains these words—"that the defendant broke and entered the iron-foundry, &c., and tore up, broke down, broke to pieces, prostrated and destroyed the same." He did tear down the premises, and pull them to pieces, and thereby did damage to the amount of 35*l*. Therefore we cannot say that the count is wholly inapplicable, although by far the greater part is so.

Upon the third point, as to the delivery of the deed as an First point. escrow, I agree with my brother *Parke*, that as the plaintiff produced it, there was *prima facie* evidence of the performance of the condition.

PATTESON, J.—I confess I have felt considerable doubt Second point  
both upon the granting of the rule and in the course of the (in argument.)

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Second point.

argument, but I am now satisfied that the fixtures did not pass. I should be sorry that the Court should be thought to say, that in general all that is affixed to the freehold would not pass with it; but here I proceed upon the particular words of the deed. The defendant appoints the premises "hereinafter mentioned, or referred to," and then *Spurrier* and the defendant grant and confirm the foundry and dwelling-houses, together with all grates, boilers, bells, and other fixtures in the dwelling-houses. *Expressio unius exclusio est alterius*. It seems to me that the intention is clear.

Third point.

Then, as to the declaration, upon looking at it I think it is for an injury to the reversion of the plaintiff—in what? in the houses and fixtures. If we resolve the general issue not guilty into a special plea, it will amount to this, that as to the fixtures, they are his; and as to the house, that the damage was done in removing those fixtures, but that no unnecessary damage was done. Then the plaintiff says there was unnecessary damage, and this was proved to the amount of 35*l*.

First point.

As to the question concerning the delivery of the deed as an escrow, that has already been decided.

Rule absolute to enter a verdict for £35.

DOB, *dem.* ROGERS and others, v. BATH.

*Semble*, that in ejectment the omission of all local description of the tenement demised, is error, though the county and vill in which the *demise*

was made are stated in the declaration, and the county is stated in the margin.

Pending a rule nisi to arrest judgment on the ground of such error, the Court allowed the plaintiff to amend the declaration and issue, on payment of the costs of both rules.

**EJECTMENT** for lands in the parish of Davidstowe, in the county of Cornwall. In the margin of the declaration were the words "Cornwall to wit." The declaration alleged, that *Rogers*, on &c. "at the parish of Davidstowe, in the county of Cornwall," demised to the plaintiff certain lands, without stating where they were situate. The declaration contained two other demises in the same form. "By

virtue of which several demises, the plaintiff entered upon the several tenements above mentioned, and became possessed thereof, and being so possessed, *William Bath* afterwards, on &c., with force and arms entered into the same tenements above mentioned, and ejected the plaintiff." At the trial before *Littledale*, J. at the Spring assizes in 1833, for the county of Cornwall, a verdict was found for the plaintiff. In Easter term following, *Coleridge*, Serjt. obtained a rule nisi to arrest the judgment, on the ground that in the declaration there was no local description of the premises, and he contended that according to the old authorities it was necessary to state not only the county, but also the parish, place, or vill, where the land was situate; and that it was still necessary at least that the premises should be described as situate in some county, and that the reason assigned was, that it ought to appear upon the face of the declaration that the lands sought to be recovered were so situated, that if a verdict were given for the plaintiff, the sheriff of the county in which the ejectment was brought might deliver the possession. He cited in support of this position the following cases:—*Farnam's case* (a), *Rich v. Shere* (b), *Gray v. Chapman* (c), *Goodtitle*, lessee of *Bremridge*, v. *Walter* (d), *Goodright dem. Smallwood v. Strother* (e), *Cottingham v. King* (f), *Connor v. West* (g).

In the same term *Erle* obtained a rule calling upon the defendant "to shew cause why the issue and nisi prius record should not be amended, by inserting the situation of the premises described in the declaration." And by that rule it was further ordered that the rule obtained by the defendant to arrest the judgment, should come on for argument at the same time.

*Erle* now appeared for the plaintiff. The Court will,

(a) 2 Leon. 186.

(b) Hob. 89.

(c) Cro. Eliz. 892.

(d) 4 Taunt. 671.

(e) 2 W. Bla. 706.

(f) 1 Burr. 623.

(g) 5 Burr. 2672.

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after verdict upon motion in arrest of judgment, intend that all matters were proved which are necessary to support the declaration (a). Here it must be taken that the lands were situate in the county of Cornwall, as otherwise the Court and jury would not have proceeded with the trial. In *Goodright v. Struther*, the declaration stated that one M.S. at H. in the county of B. demised to the plaintiff two messuages. After verdict it was moved in arrest of judgment that no vill was mentioned in which the lands demised were situate; but as it was stated in a subsequent part of the declaration, that the plaintiff at H. aforesaid ejected the plaintiff, the Court held that this amounted to a sufficient certainty that the lands lay in the vill of H. In this case it is alleged, that the demise was made in the parish of Davidstowe, and although the declaration does not say there situate, it may at this stage be assumed that they were so situate. [*Denman*, C. J. The demise may have been made any where, but the ejectment must necessarily be upon the premises.] Where there is a venue laid at the beginning of the declaration it will be held to apply to all the allegations in the declaration which follow, if no other venue be stated. In *Cottingham v. King* this point was much considered, and the argument was then pressed that there should be sufficient certainty in the declaration in order that the sheriff might be certain which were the particular acres of which he was to deliver possession. This argument was not held tenable; and it was answered, that it was the business of the plaintiff to shew to the sheriff the lands recovered, and that he was to take possession, at his peril, of the lands to which he was entitled. There are cases in which the consent rule has been considered by the Court as a means of pointing out the premises to which the verdict shall be applied. In the consent rule the premises are stated as situate at Davidstowe, in the county of Cornwall. [*Patteson*, J. There has been no case in which there has been an error of this sort. The consent rule has been resorted to only for the purpose of ascertaining the particu-

(a) See the notes to *Clement v. Fisher* in error, 1 Mann. & Ryl. 285.

lar lands in a particular parish.] The action of ejectment is now considered as a fictitious proceeding, instituted for the purpose of trying the title to property upon the merits, and the Court will not entertain objections of form which at one time might have been held to be fatal; *Doe d. Dyeball v. Lawrie* in error (*a*), *Connor v. West*. This is an objection of mere form. The judgment in this case would be for lands in the county of Cornwall. [Taunton, J. How is the sheriff to know what lands he is to take in the county of Cornwall?] The plaintiff is bound to point them out at his peril. There may be the same doubt in the mind of the sheriff as to which particular part of a large parish he is to take. If it be considered that the county is sufficiently stated in this declaration, that is sufficient.

If the objection to the declaration be held tenable, still it is apprehended the Court will allow the amendment to be made. This is plainly only a mistake in point of form.

*Coleridge*, Serjt., and *W. C. Rowe*, were to have appeared for the defendant, but were engaged at Guildhall.

DENMAN, C. J.—We cannot quite satisfy ourselves that we can go the length of saying that the declaration, as it stands at present, is sufficient to support the verdict, though we have tried hard to convince ourselves that we may; but you may amend upon payment of the costs of this application and of the rule. Probably my brother *Coleridge* will be satisfied with this.

PARKE, J.—Your verdict will of course stand upon making this amendment.

Rule for arresting the judgment discharged upon payment of costs.

Rule to amend absolute, upon payment of costs.

(a) 2 Mann. & Ryl. 184; same v. *Dyeball*, 8 Barn. & Cressw. case by the name of *Doe d. Lawrie* 70.

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## M'ARTHUR v. CAMPBELL (a).

A motion to set aside an award under a judge's order, must be made within the term ensuing the making of the award, although the arbitrator demands an excessive fee, and a copy is not in consequence obtained by either party until a few days before the time when the application is made.

ON the 25th January, 1832, an action of assumpsit, for goods sold and delivered, was commenced by *M'Arthur* against *Campbell*, to recover 8*l.* 17*s.* Plea: non assumpsit.

In Easter term, 1832, the action, and all matters in difference between the parties, were, by an order of Lord *Tenterden*, C. J. referred to the decision of *Charles Robinson*, Esq., R. N.

In Easter term last, *Follett* obtained a rule nisi, on behalf of the plaintiff, for setting aside the award made herein.

The affidavits stated as follows:—

On the 7th of August, 1832, the arbitrator commenced the investigation of the claims of the parties, and had five meetings of about five hours duration each time. On the 12th of November, 1832, the arbitrator published his award, and on that day a letter was written by his attorney to the attorneys of the plaintiff, stating that the award had been made, and was ready to be delivered by him to the parties on receiving the arbitrator's charge of 100 guineas for the same, which included his chaise-hire and expenses, and the bill of his attorney for preparing the award, amounting to 9*l.* 6*s.* 2*d.* The plaintiff further stated, that he considered the charge of 100 guineas for an arbitrator's fees and charges of an arbitration, exorbitant and excessive, since only four meetings, each of five hours duration, had taken place, no documents had been left with the arbitrator, and the arbitrator at the time had no occupation or employment. The plaintiff would not take up the award on these terms; alleging that in the event of the award being in his favour, at least two-thirds of the said sum of 100 guineas would be disallowed on taxation (b).

(a) The briefs were entitled "In the matter of the arbitration between *John M'Arthur* and *Henry Dundas Campbell*, Esqrs.," though the award was made under an order of reference in a cause pending in Court. Affidavits appearing to

be so entitled, would be considered as mere unsworn statements.

(b) Where a barrister is arbitrator, the usual fee is five guineas for the first and three for every subsequent meeting of two to three hours duration.

On the 13th of March last the fee of the arbitrator was paid by the defendant, and the award delivered to him. It was made in his favour. On the 14th March last the plaintiff received a copy of the award from the defendant; and several grounds for setting the award aside were stated in the affidavits.

Sir *James Scarlett* now shewed cause. The party has not applied to the Court within the proper time. The award was published in November. The motion to set aside was not made until Easter term, but it ought to have been made at the latest in Hilary. In a case similar to this it was held, that an award is published when the parties have notice that it is ready for delivery. *Musselbrook v. Dunkin*(a).

*Follett*, in support of the rule. This application was made as soon as the award had been obtained by the plaintiff. One reason for stating in the affidavit the exorbitant fee required by the arbitrator, is to shew that the application to set aside the award is in time. This is an award made in pursuance of an order made in a cause, and there is therefore no statutory provision as to the time of the application. [*Parke, J.* We always follow in practice the rule laid down in the statute (b).] The Court may so act in ordinary cases, but where there is good cause shewn the Court will act differently. In this case the arbitrator insisted upon a most extravagant and exorbitant charge before he would deliver up the award. In *Musselbrook v. Dunkin*, *Tindal, C. J.* states, that an award cannot be said to be ready when it is only to be had on submitting to a wrongful demand. Unless it be held that an award is published as soon as notice is given that the parties may have it upon payment of an unreasonable demand for expenses, this application is sufficiently early.

*DENMAN, C. J.*—We are all of opinion that the party seeking to set aside this award ought to have come earlier

(a) 9 Bingh. 605.

(b) 9 & 10 Will. 3, cap. 15. See

*Rogers v. Dallimore*, 1 Marsh.

471; 6 Taunt. 111.

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to the Court; nor do we think that we should have much difficulty in dealing with an arbitrator who had made an exorbitant charge. If we did not enforce the rule as to the limitation of time, we should keep litigation alive for ever.

### Rule discharged (a).

Where the time for making an award is enlarged by agreement, there being no authority for such an enlargement in the original submission, the new agreement must be made a rule of Court before an attachment can issue for non-performance of an award made during the enlarged period.

(a) Afterwards Sir *J. Scarlett* obtained a rule nisi to enforce this award by attachment. *Follett*, in Hilary term, 1834, shewed cause, and stated, that by the order of reference, no power had been given to the arbitrator to enlarge the time of making his award; that the time had been enlarged by the consent of the parties, which operated as a new submission; but he objected that this latter submission had not been made a rule of Court.

Sir *J. Scarlett*, in supporting the rule, admitted that if there were no power in the order of reference to

enlarge the time of making the award, this objection was fatal.

The order of reference, upon examination, did not contain any such power, and therefore the Court discharged the rule.

In order to entitle the parties to make a substituted submission a rule of Court, it would seem to be necessary that it should be reduced into writing, and should contain a consent to its being made a rule of Court, either by express words or by reference to the provision to that effect in the original submission. And see *ante*, 334.

### FREEMAN v. BAKER and another.

An advertisement of a ship for sale describes her as copper-fastened, and afterward contains an enumeration of masts, &c., which is headed "Inventory." The contract for the sale of the ship refers to the "inventory." This reference has not the effect of entitling the vendee to consider the description in the advertisement as forming part of the contract, though it is shewn to be usual to designate the whole advertisement by the name of "Inventory."

**CASE.** The plaintiff declared upon a warranty, that the brig *Leslie Ogilby*, sold by the defendants to the plaintiff, was copper-fastened, with a count also for a deceitful representation made by the defendants to the same effect.

At the trial before *Denman*, C. J. at the London sittings after last Hilary term, the following facts appeared:—

The plaintiff employed Mr. *Wawn* to treat with the defendants for the purchase of the *Leslie Ogilby*, which had been advertised for sale. *Wawn* accordingly called on the defendants, who gave him a printed paper, of the material parts of which the following is a copy.

"For sale, the fine brig *Leslie Ogilby*.

"193  $\frac{3}{4}$  tons, British built, coppered and copper-fastened,

shifts without ballast, takes the ground well, stows a large cargo for her tonnage, was coppered in August, 1829, is well adapted for general purposes, and requires little more than provisions to send her to sea.

“Hull, masts, yards, standing and running rigging, and stores, to be taken *with all faults*, as they now lie.

“INVENTORY.

(Here follows an inventory of all the masts, rigging, and stores; and at the end are the following words):—

“The vessel and her stores to be taken *with all faults* as they now lie, without any allowance for weight, length, quality, quantity, or any defects or injuries whatsoever.

“Inventories may be had on board, and further particulars known by applying to M<sup>c</sup>G. and P.”

17th Aug. 1831.—Upon the basis of this printed *inventory* (as the whole paper was styled by the witnesses, such papers being commonly so called), *Wawn* agreed to purchase the brig from the defendants at £——, and a memorandum of agreement was accordingly prepared and signed by *Wawn* and the defendants. This memorandum, which is upon a common printed form, does not describe the brig as copper-fastened, but contains, near the conclusion, as follows:—“On payment of the whole of the purchase money as aforesaid, a legal bill or bills of sale shall be made out and executed to the purchaser or purchasers, at his or their expense, and the said brig, and what belongs to her, shall be delivered according to the *inventory* which hath been exhibited; but the said inventory shall be made good as to quantity only. And the said brig, together with her stores, shall be taken *with all faults*, in the condition they now lie, without any allowance for weight, length, quality, or any defect whatsoever.”

Memorandum  
of agreement  
of sale.

20th Aug. 1831.—A bill of sale was executed to the plaintiff, with no other description of the vessel than that which is contained in the memorandum of agreement.

Sir *J. Scarlett*, for the defendants, contended that by the

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"inventory" referred to in the agreement, must be understood only the latter part of the paper of particulars given by the defendants to *Wawn*, and that the preceding description was not embodied in the contract: and he cited the case of *Pickering v. Dowson* (a). *Campbell*, S. G. maintained, that by "inventory" was intended the whole paper, and that, therefore, the contract embodied the representation that the brig was copper-fastened: and for this he cited the case of *Shepherd v. Kain*. The Lord Chief Justice thought that the word "inventory" only applied to that part of the paper which related to the stores, and that this case more nearly resembled *Pickering v. Dowson* than *Shepherd v. Kain*; but reserved the point, and left the case to the jury upon the facts. The jury found that the brig was not copper-fastened, and gave the plaintiff 120*l.* damages, but said also, that there was no evidence that the defendants were aware of the fact. A verdict was entered for the plaintiff, 120*l.* damages. In pursuance of leave given at the trial, Sir *J. Scarlett*, in last Easter term, obtained a rule nisi to set aside the verdict for the plaintiff and enter a verdict for the defendants, or for a nonsuit; against which,

*Campbell*, S. G., *Comyn*, and *Amos*, now showed cause. In this case there was a clear warranty, which distinguishes it from the case of *Pickering v. Dowson*. *Polhill v. Walters* (b) shews, that although in an action for false, fraudulent, and deceitful representations, the jury negative all fraud in fact, yet if the defendant have made a false representation, calculated to induce the plaintiff to act so as to incur damage, it is a fraud in law. [*Parke*, J. There, the defendant made a direct assertion of a fact, knowing it to be false.] Here, the defendants make a false representation in ignorance indeed of the fact, whereby they gain an advantage of 120*l.* [*Parke*, J. *Haycraft v. Creasy* (c) shews that not to be sufficient.] In that case the party was his own dupe. It is not necessary to prove in the words in the declaration,

(a) 4 Taunt. 779.

(c) 2 East, 92.

(b) 3 Barn. & Adol. 114.

that the defendant *falsely and fraudulently* made the representation if there be a warranty; *Williamson v. Allison* (a). Here was a clear contract that the vessel was coppered, if reference be had to the advertisement. The advertisement is referred to by the document, which is signed by the parties; and in the advertisement it is stated that the vessel is copper-fastened. Had that statement been introduced into the agreement which was signed, there clearly would have been a warranty. The question is, whether the agreement does refer to the inventory. [*Parke, J.* The question is, whether any thing *more* is referred than the inventory. The description of the vessel is at the head of the advertisement. The *inventory* is below the description of the vessel.] Inventory means the whole paper, which is called by the name of inventory. *Shepherd v. Kain* is precisely in point. There an advertisement for the sale of a ship described her as copper-fastened. The ship was sold, and it turned out that she was only partially copper-fastened. It was held, notwithstanding the advertisement had also said that the vessel was to be taken with all faults, that there was a warranty on the part of the vendor that the ship was copper-fastened, and that the vendor was liable for the breach of it. [*Parke, J.* You assume that there is a warranty in this case.] There was no more evidence of a warranty in that case than in this. Then as to *Pickering v. Dowson* and *Kain v. Old* (b). The former case was decided on the ground of fraud, not that there was no contract of warranty. The latter was determined with reference to the Register Act, 34 Geo. 3, c. 68, sec. 14.

Sir *J. Scarlett* and *Maule*, contra, were stopped by the Court.

DENMAN, C. J.—This case is confined to a very narrow point, and I am not aware that it was started at the trial. If it now appears that if the advertisement was part of the

(a) 2 East, 446.

(b) 4 D. & R. 52; S. C. 2 B. & C. 627.



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contract, the plaintiff is entitled to recover. It is for the plaintiff to shew that this advertisement is part of the contract. There is a memorandum of agreement which says, that on payment of the purchase money, a bill of sale shall be executed to the purchaser at his expense, and "the said brig, with what belongs to her, shall be delivered according to the *inventory* which hath been exhibited." The question is, whether the paper which describes the vessel as copper-fastened is the inventory referred to, or whether the reference is only to the subsequent part of the paper which commences with the word "inventory." The argument urged is, that the whole paper, which is called an inventory, is referred to. There was no evidence that this was the meaning of the undertaking. In the memorandum these words follow: "but the said inventory shall be made good *as to quantity only*." This shews that the inventory spoken of is a catalogue of stores. Looking at the agreement, I think that the word "inventory" refers only to that part of the paper which follows the description of the vessel. It is not necessary to go into the general doctrine which was established by *Pickering v. Dowson*; and as to the case of *Kain v. Old*, the question was never before the Court, whether the inventory could be embodied in the agreement.

PARKE, J.—I am also of opinion that a verdict should be entered for the defendant. This was an action brought for a deceitful representation in stating that a vessel was copper-fastened. It is contended that the plaintiff is entitled to a verdict, first, on the ground of there being a fraud; and secondly, on the ground of a warranty on the part of the defendant that the vessel was copper-fastened. The first ground has already been disposed of in the course of the argument. The jury have found that the defendants were not aware that the vessel was not copper-fastened. It was argued that this case was similar to *Polhill v. Walters*. All which that case decided was, that if a party states what he knows to be untrue, it is a fraud in law.

Then as to the warranty that the vessel was copper-fastened: taking the agreement as being the contract between the parties, it does not contain any warranty that the vessel is coppered; but there is a clause towards the conclusion of the agreement, that the vessel, with what belongs to her, shall be delivered *according to the inventory*. The question then is, whether the whole of the description in the advertisement is intended to be incorporated in the agreement, or whether so much only was intended to be embodied as relates to the enumeration of the articles there mentioned. In the first place it is stated that the inventory is to be made good as to quantity only. It was contended that the whole was intended to be embodied, because it was said in the advertisement that the vessel and her stores were to be taken with all faults. In the agreement itself it is also stipulated that the brig shall be taken with all faults. If the whole of the advertisement was intended to be incorporated, it was unnecessary to repeat this stipulation. This is a further reason, though not so strong as one as the former. Looking at the advertisement, there appears to be a distinction carefully made between the description of the vessel and the inventory. The word "inventory" is placed half-way down. It was only intended to refer to that part of the advertisement. The agreement, therefore, contains no warranty that the vessel is copper-fastened. If the parties had intended to warrant the brig copper-fastened, they should have introduced an express stipulation. If they did so intend, they must suffer for their own remissness. But I have great doubt whether they had such an intention.

TAUNTON, J.—None of the cases cited bear upon the precise point. In no one is there the same instrument as here. In *Shepherd v. Kain* it was taken for granted that the vessel was warranted to be copper-fastened. The other two cases, of *Pickering v. Dowson* and *Kain v. Old*, appear to have been cited by the counsel by way of anticipation. They are certainly not authorities in their favour. I con-

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fess, upon the question whether it was agreed that the vessel should be copper-fastened, I want no authorities to confirm me in the impression which I now entertain. In the memorandum of agreement it is stated, that the said brig, *with what belongs to her*, shall be delivered according to the inventory which hath been exhibited. These words, "according to the inventory," can only be referable to what belongs to her, viz. the rigging and tackle. The memorandum then goes on—but the said inventory shall be made good as to quantity only. If it is taken that the "inventory" contains the description of the vessel, then it is to be made good, not as to the quantity only, but as to the quality also. Let us see the paper which is supposed to be embodied in the agreement, and which it is said contains the warranty. Here is the word "inventory" placed in the middle of the paper. I take it to be perfectly clear the preceding part forms no part of the inventory. If the word "inventory" had been placed at the top of the paper there might have been some ground for arguing that it was a title applicable to the whole. The word "inventory" is placed at the head of a list of articles, and applies only to that list.

PATTESON, J.—I also think this rule should be made absolute. The case, as I understand it, is put upon two grounds; first, on the ground of false representation; secondly, on the ground of there being an express warranty. Upon the first ground the Solicitor-General relied on *Polhill v. Watters*. If the report of that case be examined, it will be found that there the party made a representation which he knew was false. It is pointedly put by Lord *Tenterden* on that ground. That distinguishes this case from it. Then, as to the express warranty; that depends upon whether the whole paper containing the advertisement is to be embodied with the agreement. I own I feel great difficulty in putting a construction upon a word different from its ordinary meaning. Here the defendant has used the word

“inventory” in its ordinary sense, by putting the word in the middle of the paper, before the enumeration of a number of articles. I would not, without the most cogent reason, give a different meaning to a word from that which is ordinarily put upon it by mankind. It is not necessary to do that in this case.

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Rule absolute.

CHEETHAM and Wife v. BUTLER.

**ASSUMPSIT** on a promissory note, given to the wife dum sola. Plea: the general issue. At the trial before *Denman*, C. J., at the Lincolnshire Spring assizes, 1833, the following note, signed by the defendant and stamped with a note stamp of 3s. 6d., was given in evidence:—

“I promise to pay to *Mary Meyer* the sum of £100 for value received.”

It was objected that the stamp should have been 8s. 6d.

The learned Chief Justice nonsuited the plaintiff, but gave him leave to move to enter a verdict. In Easter term last Sir *J. Scarlett* obtained a rule nisi accordingly; against which

A promissory note, payable to *M. M.*, without the words “order” or “bearer” and without any indication of the time of payment, is not a promissory note, payable to the bearer on demand, within 55 Geo. 3, c. 184, sched. part I.

*Campbell*, S. G., now shewed cause. The question here is, whether this note falls within the first or the second class of notes mentioned in the schedule to 55 Geo. 3, c. 184. If it came under the first class, of promissory notes “for the payment to the bearer on demand,” the stamp should have been 8s. 6d. If it be a note “for the payment in any other manner than to the bearer on demand,” the present stamp of 3s. 6d. is sufficient. It is submitted that this is payable to the bearer on demand. It is not said to be payable on demand; but in a case of a note payable to bearer generally, without saying “on demand,” the Court

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held that the note was within the first class: *Whitlock v. Underwood* (a). Here the note is not expressed to be payable to *bearer*; but in the case of *Keates v. Whieldon* (b), the Court held that a note payable "to I. K. on demand" was a note "payable to the *bearer* on demand (c)." That case was fully argued and solemnly decided. All that can be urged now to shew that the note is not payable to the bearer was brought forward then before the judge (d) at nisi prius, and in the full Court (e). If that case be law, cadit quæstio. It must be admitted that in two subsequent cases it was held that a note payable to a party on his order or demand was not within the division in the schedule which relates to notes for the payment in any other manner than to the bearer on demand: *Armitage v. Berry* (f), *Moyser v. Whitaker* (g).

Sir J. Scarlett (with whom was *Humfrey*), contra, was stopped by the Court.

DENMAN, C. J.—The case of *Keates v. Whieldon* cannot be supported, and that is the opinion of us all.

PARKE, J.—I think the decision in that case was wrong.

TAUNTON, J., and PATTESON, J., concurred.

Rule absolute.

(a) 3 Dowl. & Ryl. 356; 2 Barn. & Cressw. 157.

(b) 8 Barn. & Cressw. 7; S. C. per nomen *East v. —*, 2 Mann. & Ryl. 8.

(c) In the report in 2 Mann. & Ryl. 8, the note is stated to have been expressed to be payable to the bearer.

(d) *Park*, (J. A.) J.

(e) *Keates v. Whieldon* was heard upon an ex parte application only, as a rule nisi was refused; a circumstance which materially lessens the authority of the decision.

(f) 5 Bingh. 501; S. C. more fully reported, 3 Moore & Payne, 211.

(g) 9 Barn. & Cressw. 409.

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## PRATT v. VIZARD and BLOWER.

**ASSUMPSIT** for money had and received. Plea: the general issue. At the trial at the sittings in London after Hilary term, 1833, before *Denman*, C. J., the following facts appeared:—

In 1829, the plaintiff applied to *Rowley* and *Mansel*, who, as trustees under the will of *Thomas Rowley*, had a large sum of money standing in their names in the funds, to advance him 4,000*l.* upon security of an estate in Worcester-shire. It was ultimately agreed that 3,000*l.* should be advanced; and the plaintiff delivered the title deeds of the estate to *Rowley*, who gave them to the defendants as his attorneys to investigate the title and prepare the mortgage. On the 4th of June, 1829, the plaintiff addressed the following letter to *Rowley*:—"I return you thanks for your kind reply to my request. I have sent the title deeds, and *I shall pay with pleasure all expenses attending the same.*" Drafts of the mortgage and of a declaration of trust were sent to the plaintiff for his approval. He carried those drafts to Mr. *Davison*, another attorney, when it was discovered that *Mansel* had not been properly appointed trustee under the will of *Rowley*. Upon this the plaintiff refused to complete the mortgage, and demanded his title deeds, which the defendants refused to deliver up, unless their bill of costs were paid. The defendant paid the bill under protest, and this action was brought by him to recover back the money. It was admitted at the trial that the business had been done. It appeared also, that the plaintiff had subsequently procured a loan from a client of Mr. *Davison*. The chief justice nonsuited the plaintiff, giving him leave to move to enter a verdict. In Easter term last, *Platt* obtained a rule nisi accordingly; against which,

*A.*, the attorney of *B.*, an intended mortgagee, has no lien as against *C.*, the intended mortgagee, for the costs of preparing the mortgage upon deeds delivered by *C.* to *B.*, and by the latter handed over to *A.* for the purpose of investigating *C.*'s title.

Sir *J. Scarlett* and *R. V. Richards* now shewed cause.

I. The defendants had a lien upon the title deeds, and

First point:  
Lien at common law.

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were entitled to retain them until their bill was paid. It is usual for the person who borrows money to pay the expenses attending the transaction. In the ordinary course of business the mortgagee appoints the attorney, who becomes the attorney also of the mortgagor.

Second point:  
Lien by special  
agreement.

II. There is, however, in this case, a special agreement by the mortgagor to pay the expenses. Of this agreement the letter is evidence.

Third point:  
Estoppel.

III. It is submitted that *Mansel's* appointment was perfectly regular. Assuming it to be otherwise, it is not competent to the plaintiff to take the objection. The plaintiff had dealt with *Rowley* and *Mansel* in the character of trustees. It was not until *Davison* was called in that the objection to the appointment of *Mansel* was taken. It is then said, that the money must be lent by *Rowley* alone. The money was standing in the joint names of *Rowley* and *Mansel*. They jointly had the controul over it, and therefore they were the proper parties to the loan of it.

First point.

*Platt*, in support of the rule. I. The defendants had no lien upon the deeds against the plaintiff, and there was no privity of contract as to the costs between the plaintiffs and the defendants. The latter were entitled to retain the deeds as against their employers, but not as against the plaintiff, by whom they were not employed. The deeds were delivered by the plaintiff to *Rowley*, not to the defendants. It was *Rowley* who delivered the deeds to the defendants. *Rowley* could communicate to the defendants no greater right to retain the deeds than he himself had. *Hollis v. Claridge* (a) is precisely similar to this case, except that there the plaintiff was attempting to raise money by way of annuity. There the deeds were delivered by the plaintiff to the proposed grantee of the annuity, and he gave them to the defendant, who was a conveyancer, to investigate the title. The negotiation was broken off, and the defendant

(a) 4 Taunt. 807.

retained the deeds, claiming a lien. The plaintiff brought trover for the deeds, and the Court held that the defendant had no lien. It is said, that in all cases the mortgagee's attorney is the attorney of the mortgagor. That is not the ordinary course of business; distinct attorneys are usually employed by both parties.

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II. The plaintiff's letter does not enure as a promise to the defendants. The contract was between the plaintiff and *Rowley*. If the plaintiff had refused to pay the expenses, the letter could not have been evidence for the defendants in an action brought by them against the plaintiff. Second point.

III. It was admitted that the appointment of *Mansel* as trustee was invalid. The declaration of trust contained a recital that *Mansel* had been duly appointed. The plaintiff was therefore fully justified in breaking off the negotiation and procuring the money elsewhere. Third point.

DENMAN, C. J.—I am of opinion that this rule should be made absolute. The question whether the defendants had a lien upon the title deeds depends upon the question whether the plaintiff ever employed the defendants. It appears to me that the plaintiff never employed the defendants. They were only attorneys for the mortgagee, and it was their duty, contrary to the interest of the plaintiff, to find out all objections to his title. The letter in which the plaintiff says that he will pay the expenses, was addressed to *Rowley*, and constitutes no contract between the plaintiff and the defendants. First point.

Second point.

PARKE, J.—A mortgage is proposed, in which *Rowley* is to be the lender and the plaintiff the borrower. The deeds are delivered by *Rowley* to the defendants. The negotiation is broken off, and the plaintiff demands the deeds, which the defendants refuse to deliver up unless their bill is paid; and the plaintiff, in order to recover his deeds, pays the amount of the bill under protest. If therefore the defendants had no right to retain the deeds, that



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Second point.

amount so paid may be recovered back (a). The question therefore is, whether the defendants had a lien upon the title deeds. *Holles v. Claridge* shews clearly that *Rowley* could communicate to the defendants no greater right than he himself possessed (b). Then it is said there was an agreement that the expenses of investigating the title should be paid by the plaintiff. There is no evidence of such an agreement *with the defendants*. They stand in the double character of attorneys to the mortgagor and the mortgagee. It is the usual practice for persons mortgaging to pay the expense of the mortgage, and no doubt if the mortgage had gone off, the plaintiff must *ultimately* have paid the expense. The question is, whether there is any privity of contract between the plaintiff and the defendants. Clearly upon the facts there was not any such privity. What the defendants were employed to do was, as my lord has observed, rather contrary to the plaintiffs' interest. I think they acted as the attorneys only of the mortgagee. All they did was to look to the interest of the lenders. It is perfectly clear that there was no privity of contract with the plaintiff, as there was no employment by him. Therefore the defendants had no lien of their own; and *Hollis v. Claridge* shews that none could be given to them by *Rowley*.

TAUNTON, J.—I am also of opinion that the defendants had no lien upon the title deeds either in a right derived from *Rowley* or in their own right. With reference to the right derived from *Rowley*, it is quite clear they could have none, because the title deeds were delivered to *Rowley*, not to hand them over to the defendants, but to look over

(a) *Vide* 20 Ass. fo. 72, pl. 14; 26, n.; *Hodgson v. Williams*, *ibid.* Bro. Abr. Duress, pl. 12; *Sumner v. Ferryman*, 11 Mod. 201; *Irving v. Wilson*, 4 T. R. 485; *Mant v. Stokes*, *ibid.* 564; *Brown v. Hodgson*, 4 Taunt. 189; *Geraldes v. Donison*, Holt, N. P. C. 346; *Fulham v. Down*, 6 Esp. N. P. C. 29.

(b) As to the application of this principle, see *Mallory's case*, 5 Co. Rep. 113; Sir *Moyle Finch's case*, 6 Co. Rep. 68; Coke, Complete Copyholder, 47, sect. 34; *Long v. Buckeridge*, 1 Stra. 111.

and investigate them himself. He had no right, upon this simple delivery, to hand them over to the defendants for another purpose, nor could he thereby give a right of lien to them. *Hollis v. Claridge* shews that the defendants could not claim a greater right than *Rowley* himself had. Then, as to the defendants' lien in their own right, that could only be if they were employed as the solicitors of the plaintiff. It is very true that, ultimately, the law expenses come out of the pocket of the borrower. In annuity transactions, and I believe also in mortgages, when the business is done, the attorney produces his bill, and the borrower receives the sum lent (*a*), minus the amount of the attorney's bill. But the action for the expenses must be brought against the person who employs the attorney, and not against the individual out of whose pocket the money ultimately comes. A lien can only arise where there is privity between the parties in consideration of something done by the one for the other. In this case there was no such lien as gave the defendant a right of retaining the deeds.

PATTESON, J.—I am entirely of the same opinion. It is quite unnecessary to say any thing: I could only repeat what has been said already.

#### Rule absolute (*b*).

(*a*) Except in the cases (of comparatively rare occurrence) in which annuities are purchased as a bona fide life provision for the grantee, the money paid (nominally) as the consideration of the annuity is properly said to be *lent*, redeemable life annuities being merely a mode of evading the statute of usury,—the lender stipulating for such interest as will compensate him for the loss of the use of his money and for the risk of the borrower's solvency, or of the sufficiency of his securities, (for which use and risk the borrower would have had to pay even if no usury laws had

existed,) and also for such further interest as will indemnify him against premiums of insurance and other contingencies in respect of the deaths of the cettoux que vies, against the hazards created by the annuity acts, and generally in respect of the false position in which he is placed by being compelled, though really a mere lender of money, to assume the character of the purchaser of an annuity, contrary to the intentions and to the interest of all parties concerned.

(*b*) See *Ogle v. Story*, *ante*, vol. i. 474.

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A statement made by the late master of a servant to another person who had thoughts of engaging that servant, is not privileged where from other evidence, though of a slight description, the jury has inferred actual malice.

An allegation that the defendant said of the plaintiff, "She secreted 1s. 6d. under the till, *stating, these are not times to be robbed,*" was held to import that the plaintiff, when secreting the 1s. 6d., had used the latter words, and that therefore the allegation did not contain that which was actionable per se, so as to disentitle the plaintiff to full costs where the verdict was under 40s.

**CASE for slander by a servant against her late master.—**  
The declaration contained five counts, and concluded with an allegation of special damage. The second count stated, that in the presence, &c. the defendant "falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning her as such shopwoman or servant, these other false, scandalous, and malicious and defamatory words following, that is to say, she (meaning the plaintiff) secreted one shilling and sixpence under the till, stating—these are not times to be robbed." At the trial before *Patteson, J.*, at the sittings at Westminster, in Easter term, 1833, the following facts appeared:

One *Stenning*, who intended taking the plaintiff into his service as shopwoman, inquired of the defendant, her former master, what her character was; upon which the defendant imputed theft to her, and charged her with having secreted money under the till; and said that before he had paid her any wages, she had repaid her mother 10s. which she had borrowed of her, and had given her a sovereign besides. In consequence of this communication *Stenning* refused to take her into his service. A brother-in-law of the plaintiff suggested to the defendant, upon whom he called for an explanation of the words he had used, that he had probably made some entry of the time when he paid the plaintiff her wages, and that if so, he might, by referring to it, find that he was mistaken in supposing that the sovereign and a half had been given by the plaintiff to her mother before the receipt of wages. The defendant then took from his desk a memorandum-book, and, after looking at it, asked the brother-in-law whether he knew the time when the plaintiff received her wages? and upon his answering, that he did not, but would abide by his (the defendant's) account, said, "Then if you do not know, I am not going to tell you," and returned the book

to his desk. After some other observations, the brother complained, that, owing to the defendant's conduct, the plaintiff might have been thrown upon the town, if she had not had friends; upon which the defendant, alluding to himself and his wife, said, "What is that to us." Sir *J. Scarlett*, for the defendant, submitted that there should be a nonsuit, for that the communication to *Stenning* was privileged, and that there was no evidence of express malice. The learned judge refused to nonsuit the plaintiff, but reserved the point. The jury returned a general verdict for the plaintiff, with one shilling damages.

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Sir *J. Scarlett*, in Easter term, moved for a rule nisi to enter a nonsuit, on the ground that no express malice had been proved; and he cited *Child v. Affleck* (a) as a case in point, but even stronger than the present.

DENMAN, C. J.—Where nothing has taken place but what has been said by one master to another, the case ought never to come before a jury. But where there are other circumstances from which a private motive may be presumed, there the case may well be considered by a jury. There were in this case other circumstances, such as the refusal to produce the book, which might have disproved some part of the charge against the plaintiff; and the answer "What is that to us?" when the brother-in-law said that the defendant's conduct might have driven the plaintiff upon the town. These circumstances were slight, but it was proper that they should go to the jury. There must be no rule.

LITLEDALE, J. and PARKE, J. concurred.

Rule refused.

Upon an affidavit, stating that upon application to the Masters, they had declined taxing the costs of the cause until

(a) 4 Mann. & Ryl. 338; 9 Barn. & Cresw. 403.

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the opinion of the Court had been taken as to whether the plaintiff was entitled to the costs generally, or only to as much costs as damages, *Campbell*, S. G., in the same term, obtained a rule to shew cause why it should not be referred to the Master to tax the plaintiff her increased costs in the cause. Against which rule

Sir *J. Scarlett* and *F. Kelly* now shewed cause. The question is, whether any one of the counts contains words which are not actionable without special damage; for the verdict being general, unless all the counts be upon words actionable in themselves, the plaintiff will be entitled to her full costs. [*Patteson*, J. upon this point referred to *Saville v. Jardine* (a).] It is submitted that there is no count in this declaration in which the words are not actionable in themselves. If the words be actionable, and special damage results, this is matter of aggravation only, and the plaintiff is not entitled to full costs unless the damages exceed 40s. In all these counts there are words which, either of themselves, or taken, as they must be after verdict, together with the inuendoes, impute to the plaintiff the commission of a felony. [*Campbell*, S. G. said that he intended to rely only upon the second count.] In that count there certainly is no inuendo. The defendant puts his own inuendo on the words themselves. The words are, "She secreted one shilling and sixpence under the till, stating—these are not times to be robbed." These words are alleged to be spoken of her in her character of a shopwoman. What other sense can be attached to these words than an imputation that she had availed herself of the opportunities which she had as a shopwoman to rob her master? The proper construction to be put upon the words is, that they bear that signification which would be put upon them in ordinary conversation: *Tomlinson v. Brittelbank* (b). [*Denman*, C. J. There, the words used were quite distinct.] It cannot be doubted that in the ordinary meaning of the

(a) 2 H. Bla. 531.

(b) *Ante*, vol. i. 455.

language this is an imputation of theft. Suppose an indictment for feloniously stealing and taking the property of her master, the evidence to the same effect of these words would have been sufficient to support the indictment.

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*Campbell, S. G.* This count would not have been sustainable upon demurrer, unless there had been an allegation of special damage. The words are, "She secreted one shilling and sixpence under the till, *stating—these are not times to be robbed.*" This means strictly that *she* stated that these were not times to be robbed. It might mean only, that she was cautious about her own money, and secreted it in order that it might not be stolen. [*Parke, J.* That argument will endanger your judgment(a).] But supposing that it must be taken that the *defendant* stated, that these are not times to be robbed, the words standing as they do, unexplained by any innuendo, are not sufficient to support the verdict without special damage. Where the words are most clearly actionable in themselves, as where it is said of a man that he is a murderer or a thief, no innuendo is necessary; but this is not such a clear case.

Here he was stopped by the Court.

*DENMAN, C. J.*—The question is, whether any of these counts is for words not actionable in themselves. If it is to be taken that the words, "stating, these are not times to be robbed," were spoken by the defendant, it would be a good objection to the plaintiff's being allowed her full costs. But in the other view, and which I think is the proper one, the words are not actionable. This rule must be made absolute.

*PARKE, J.*—I am of the same opinion. It is impossible to maintain the action for those words upon the record. We can only construe the words in their grammatical

(a) In Hilary term following upon the ground that these words (1834), judgment was arrested, were in themselves quite innocent.

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sense: they impute no crime, but rather that the plaintiff was a cautious person. Whether the judgment can be maintained hereafter is another question. The plaintiff is entitled to her full costs.

TAUNTON, J. and PATTESON, J. concurred.

Rule absolute.

The KING v. The VESTRYMEN and VESTRY-CLERKS of  
 the Parish of ST. LUKE'S, Middlesex.

Where a statute directs an election by poll, *semble* that the poll may be taken from the holding up of the electors' hands. But if the tellers appointed to take the numbers differ, and a poll is demanded and refused, the Court will grant a mandamus to enter adjournment of the election meeting, and to proceed to complete the election.

**FOLLETT** had obtained a rule calling upon the vestrymen and vestry-clerk of St. Luke's, to shew cause why a mandamus should not issue directed to them, commanding them to enter on the vestry-minutes, adjournments from day to day of a vestry held on the 18th June last, for the election of trustees under 50 Geo. 3, cap. cxlix. for lighting &c. the said parish, and the 2d Will. 4, cap. xiii. for enlarging the powers of that act, and to proceed to hold a poll and complete the election of twenty-nine trustees for lighting, watching &c. the said parish. The affidavits upon which the rule was granted stated the following facts:—

On the 18th of last June a vestry meeting was duly convened for the election of twenty-nine new trustees under the above acts. The vestry appointed Mr. *Moreland* chairman of the meeting; and from time to time four persons were appointed as tellers to assist the chairman in counting the number of votes for the candidates who might be proposed. Sixty candidates were nominated, and their names were submitted, one by one, to the vestry, who expressed their wish to elect any such candidate by holding up their hands, except as to the first, upon whose nomination a division took place. The chairman and tellers ascertained the number of hands for each candidate, which was

minuted by the vestry-clerk, and immediately announced by the chairman to the vestry before he proceeded to the election of any other candidate. After the opinion of the vestry had been so taken as to all the sixty candidates, twenty-four of the candidates signed a requisition to the chairman, requiring a ballot or poll on the behalf of four candidates, who had been in a minority, there having been twenty-nine other candidates who were declared to have had higher numbers. This requisition was read to the vestry; upon which some of the vestry required that the election should be completed by the chairman's announcing the names of the twenty-nine candidates having a majority of votes, which the chairman refused, because a ballot or poll had been demanded. The chairman was then voted out of the chair by a large majority, and quitted it accordingly. The vestry then appointed another chairman, and ordered that the vestry-clerk should make out a list of the twenty-nine candidates who had the largest number of votes, which being done, twenty-nine candidates, of whom the chairman was one, were declared by him duly chosen. It was further alleged, that during the whole of the proceedings there was violent noise, tumult, and disorder; in consequence of which, the tellers and chairman could not count the number of votes or estimate them correctly, and that upon every show of hands for the election of the candidate, there was a great discrepancy in the opinion of the tellers as to the real amount of votes. No ballot or poll was had according to the requisition.

The affidavits in answer denied that there had been any great noise during the counting of votes, or that there had been any difficulty on the part of the tellers in correctly ascertaining the number of votes; and alleged that the confusion did not commence until after the ballot or poll had been required; that when this requisition was made, the vestry-clerk stated that it was not customary to do so, and that the election had been conducted in the same way as all former elections, and that, in his opinion, the granting a poll or ballot would be contrary to the several acts of parliament.

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Other deponents also stated it as their belief, that the election had proceeded in strict conformity with the general mode of conducting elections of trustees in that parish under the acts. The meeting was dissolved at twelve o'clock at night, no proposition having been made for an adjournment.

50 *Geo. 3*, c. 149, s. 3, directs that a vestry shall be held on the Tuesday before 24th June in each year, for the election of trustees for putting into execution that act, in the room of those annually going out of office, under the provisions of that act, and for the purpose of filling up vacancies.

Section 14 requires that twenty vestrymen shall attend, and that if the election be not made or finished or completed on that day, an adjourned meeting shall be held on each succeeding day, from day to day.

2 *Will. 4*, c. xiii. s. 15, changes the time for the meeting of the vestry from ten o'clock in the morning to between six and seven in the evening, except on special or particular occasions, when it is made lawful for a majority of the vestrymen present at any such meeting to fix upon any other hour for holding such meetings.

*Comyn* and *S. Temple* now shewed cause. This is an application for a mandamus to compel the vestrymen and vestry-clerk; first, to enter adjournments of the vestry held on the 18th June; secondly, to proceed to hold a poll; thirdly, to complete the election of twenty-nine trustees.

First point:  
Entry of ad-  
journment.

I. It is submitted that the adjournment cannot now be made. There should have been an adjournment by a majority of the whole meeting. Here, it does not appear that any proposal for an adjournment, for the purposes of taking a poll, was either put or carried. The chairman has not the power to adjourn without the authority of a majority of the meeting; *Stoughton v. Reynolds* (a).

Second point:  
What, a taking  
of the poll.

II. The next question is, whether there has, in fact, been a poll or not. It is submitted, that what was done amounted to a poll, particularly as there is no suggestion

that there were in the room any persons who were not entitled to vote. The chairman may, in the first place, declare the election by his view; but afterwards, on a poll being demanded by any party who is not satisfied with this mode of ascertaining the determination of the electors, the votes must be taken individually *per capita*; and this in whatever particular manner it may be done is the *poll*; *Middlesex case*(a). Even at elections for members of parliament, it was not necessary, before the passing of 7 & 8 Will. 3, c. 25, for the returning officer to take the names of the electors in writing. [*Denman, C. J.* It is the mode in which the poll is taken in parliament.] If all the electors held up their hands, and these were counted individually, the parties have had such a poll as they were entitled to demand.

III. The trustees are at present *de facto* in possession of the office; and where an office is full, the Court will not try the question as to the validity of the election upon affidavits. [*Denman, C. J.* You mean that there should be a *quo warranto*. I do not know that a *quo warranto* will lie for your office(b). *Parke, J.* There was a case in which a difference of opinion prevailed upon the bench, as to whether a *quo warranto* would lie for this office; the question was not finally decided.]

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Third point:  
Office full.

*Campbell, S. G. and Follett, contra.* The 14th section of 50 Geo. 3, c. cxlix. directs, that if the election be not completed on the day named, an adjournment shall take place from day to day. [*Denman, C. J.* The real question is, whether a poll has actually taken place on the day.] It cannot be said that any poll has been taken, for it is sworn that on no one occasion did all the tellers agree in the number of voters.

DENMAN, C. J.—It struck me certainly, that if all the tellers had agreed in their results, although there was no

(a) 2 Peckw. Elect. Cases, 348, Br. Red. 137; Glanville, 87.  
368; 1 Whitelock, 393; Prynne. (b) And see 1 Ventr. 148, 158.

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formal poll, this would have been a good declaration of the poll; but as the tellers did not agree, it is impossible for us to say that every individual voter was counted. The mandamus must issue, and a return may be made.

Rule absolute.

DOE, on the demise of THOMAS STANDISH and WILLIAM  
BLACKBURN, v. ROE.

Proceedings stayed in a second ejectment on the several demises of *A.* an insolvent debtor, and of *B.* his assignee, until payment of the costs of a former ejectment brought by *A.*

*WIGHTMAN* obtained a rule nisi to stay proceedings until payment of the costs of two former ejectments on the demise of *Thomas Standish*, brought, like the present, to recover possession of *Duxbury Hall*, and estates of considerable extent, in the county of *Lancaster*, formerly the property of the late *Sir Frank Standish*, and then enjoyed by *Frank Hall Standish*, Esq., who defended as landlord, jointly with a tenant, in each action. One of these actions came on for trial at the *Lancaster assizes* in 1818, when the plaintiff withdrew the record. In the following *Michaelmas* term the defendant obtained a rule nisi for judgment as in case of a nonsuit, which was discharged upon an undertaking to try the cause at the next assizes. The record was accordingly again entered, but was again withdrawn. The defendant's taxed costs, on the occasion of the former entry for trial, amounted to 32*l.* 10*s.*; and on the latter entry, to 397*l.* 10*s.* On the 2d January, 1821, *Thomas Standish* took the benefit of the *Insolvent Debtors' Act*, having inserted these costs in the schedule of his debts. *William Blackburn* was appointed assignee.

In the affidavits filed on behalf of *Frank Hall Standish*, it was stated that in the year 1813 *Thomas Standish* had been convicted of a forcible entry upon the property in question; and that his discharge under the *Insolvent Debtors' Act*, and the appointment of *Blackburn* as his

assignee, had been concerted with a view to bring another ejectment, without paying the costs of the former ejectment. In the affidavit filed on the part of the lessors of the plaintiff, it was denied that the discharge of *Thomas Standish*, and the appointment of *Blackburn* as his assignee, had been concerted; and it was stated that *Thomas Standish* had a good title to the property in dispute.

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In Easter term last, *J. Williams* and *Tomlinson* showed cause. This ejectment is not brought by the same persons, and is not therefore within the general rule, that before the Court will allow a second ejectment to be brought, the costs of the first must be paid. In *Doe d. Chambers v. Law* (a), the Court prevented the assignee of an insolvent debtor from bringing a second ejectment until the costs of the first were paid. But there the debtor had fraudulently made the assignment under the Insolvent Debtors' Act, in order to bring the second action. On this ground that case is distinguishable from the present. Here two parties are interested—the insolvent and his assignee. The effect of making this rule absolute will be to suppress the rights of both. If the insolvent had sued in formâ pauperis, there might have been some ground for this motion. In *Brittain v. Greenville* (b), where the lessor had sued in formâ pauperis, the Court refused to interfere. In *Tidd's Practice*, 1233(c), it is said, that it is now settled that the proceedings may be stayed in all cases, until the costs are paid of a former ejectment. But no authority is cited for this position; nor is any such authority to be found.

*Wightman* contra. This case falls within the general rule, that the Court will stay proceedings in a second ejectment, until the costs of a prior ejectment are paid,

(a) 2 Wm. Bla. 1180.

(b) 2 Stra. 1120; S. C. 16 Vin. Abr. 262, pl. 15.

(c) 9th ed. In the passage cited,

Mr. Tidd refers the reader back to page 538, where the authorities are collected, and to *Adams, Ejectment*, 2d ed. 319.

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where the title relied upon is the same in both actions. [Parke, J. Have you found any case where assignees of a bankrupt have been prevented from bringing a second ejectment, the debt for the costs having been proved under the commission, and the bankrupt having obtained his certificate?] No such case has been found. This second ejectment is brought on the same title, and between the same parties. The debt of the assignee consists of money lent to the insolvent to carry on this suit. In *Doe d. Feldon v. Roe(a)*, the first ejectment was brought by the father, and the second by the son; and an application was made to stay the proceedings in the second ejectment, until the costs of the first were paid. Lord Kenyon there says: "The case cited(b) is directly in point, and a cogent reason is there given, that ejectments were introduced in lieu of real actions, in which all the representatives of the party to the first suit would have been concluded for ever. Therefore we should not suffer this fictitious remedy, which was introduced in lieu of the other, to press unnecessarily hard upon the parties." In *Keene d. Angel v. Angel(c)*, Lord Kenyon lays down the rule generally, that where the second ejectment is brought to try the same question as was tried in the first, the Court will stay the proceedings in the second, until the costs of the first are paid. [Parke, J. The only circumstance which creates a doubt in my mind is, whether, as the *remedy* for the costs is gone, they may not be considered as *discharged*.] The circumstance of the remedy for the costs of the first ejectment being taken away, can afford no reason for breaking in upon the practice of the Court. If this rule is not made absolute, a wide door will be opened to fraud. In *Doe on the demise of Cotterell v. Roe(d)* also, the rule is as expressly laid down as in *Keene d. Angel v. Angel*.

*Cur. adv. vult.*

(a) 8 T. R. 645.

(c) 6 T. R. 740.

(b) *Doe d. Lawson v. Law*, ib.

(d) 1 Chitty, Rep. 195.

In the course of this term the judgment of the Court was delivered by

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DENMAN, C. J.—We are of opinion that the rule does apply to the assignees of an insolvent debtor. Proceedings in the second ejectment will, therefore, be stayed until the costs of the first are paid.

Rule absolute.

GRACE PEARSON, THOS. SPEDDING and JAS. PEARSON,  
Executrix and Executors, &c. v. WM. PEARSON.

THIS cause coming on to be tried at the summer assizes, 1832, for the county of York, it was ordered by the Court, with the consent of parties, that a verdict should be entered for the plaintiffs for 59*l.* 19*s.* 6*d.*, costs 40*s.*, subject to the award of *William Turner*, attorney at law, to whom all matters in difference between the parties were thereby referred; and that if the said arbitrator should so order, a verdict or a nonsuit for the plaintiffs, or a verdict for the defendant, should be entered, as he should direct, with power for the said arbitrator to state any point of law upon the face of his award. The arbitrator by his award, made in January, 1833, after reciting the order of reference, found that by a certain agreement made on the 7th March, 1828, between the defendant and the plaintiff *James Pearson*, of the one part, and the plaintiffs *Thomas Spedding* and *Grace Pearson*, widow, who were in the agreement described as two of the executors of the last will and testament of *William Pearson*, deceased, of the other part; after reciting that *W. P.*, deceased, had, on 24th February, 1825, made and duly executed his last will in writing, and had thereby devised all his real and personal property to *Grace P.* for life, and after the determination of that estate to *James P.* and his heirs for ever, subject, nevertheless, to the payment

*A., B. and C., executors of D., sell goods of their testator to E., the price to be paid to C. to be by him distributed among the creditors of D. The three executors may, without a special count, maintain indebitatus assumpsit (or debt) against E.*

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of the testator's debts, funeral and testamentary expenses: And also reciting, that after the making of this will the testator had purchased a certain messuage used as a public-house, called the Royal Oak, with the land and appurtenants thereunto belonging, and a certain other messuage; which two last-mentioned messuages were not mentioned in a devise by the testator, and at his death became the property of the defendant as heir at law: And also reciting that the defendant and *James P.*, being desirous to make a provision for *Grace P.* during her life, and for payment of the testator's debts, the defendant and *James P.* had agreed with each other, with the consent of *Grace P.* and *Thomas Spedding*, that the defendant and *James P.* would, on the 6th day of April then next, sell all the household goods and other personal property then in and about the Royal Oak, and also would collect the book debts due to *W. P.*, deceased, and should sell a share in a turnpike road; and that the defendant and *James P.* had thereby further agreed that the money that should arise therefrom should be taken and received by *Spedding*, for and towards the payment of all debts of *W. P.*, deceased: And further, that the said messuage and a certain cottage, and all other the real property which *W. P.* died possessed of, should be valued, appraised and divided by two persons therein named or their umpire; and that when the said valuation or partition should be completed, a plan of the same should be submitted for inspection of the defendant and *James P.*, and that the defendant should be at liberty to select either of the lots or partitions; and further, that they would execute a conveyance for securing the shares to each; and that they would sign deeds for securing to *Grace P.* 15*l.* a year for life: And that the said *Grace P.* had thereby agreed, to and with the defendant and *James P.* and *Spedding*, that as soon as the 15*l.* a year was secured to her, she would sign any deed of partition requisite for the purpose of conveying the real estate to the defendant and *James P.* in manner thereinbefore mentioned, subject to the payment

of principal and interest of mortgages effected by *W. P.*, deceased: And that the defendant had thereby agreed with *Spedding, James P. and Grace P.*, that in case he took possession of the said house and the household goods, and all the personal property then deposited in the said messuage, *he would, upon the signing of that agreement, pay to Spedding the full value thereof, or give sufficient security for the payment thereof*: And that the defendant and *J. P.* thereby agreed that in case the book debts, household furniture and other personal property, should not be sufficient to pay the debts, funeral and testamentary expenses, due from *W. P.*, deceased, they would jointly and equally raise and pay to *Spedding* such sum as would enable him to pay the debts as aforesaid: Provided nevertheless, that *Grace P.* might select such part of the goods as she was possessed of at the time of her marriage, on condition that she would give security to restore the same to the defendant and *James P.* at her death. And the arbitrator further found that the defendant had, with the permission of the plaintiffs, taken possession of the said household furniture, &c. and that the full value thereof, as ascertained by appraisement, was 164*l.* 6*s.* 3*d.* And he further found that the defendant had not, at the time of signing such agreement, or at any time, paid to *Spedding* the said sum of 164*l.* 6*s.* 3*d.* or given security for the payment of the same: And he further found that the said household goods were the property of the plaintiffs as executrix and executors of *W. P.*, deceased: And he further found that the defendant, after he had taken possession of the goods, had found that there were many articles which he did not want, and that it had therefore been agreed between the plaintiffs and the defendant that the defendant should select such parts as he should think proper, and that he should take the same at the prices at which they had been before valued, and that the remainder should be taken and sold by the plaintiffs; but that the intended agreement was verbal only: And he further found that the defendant had taken goods of the

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value of 55*l.* 3*s.* 6*d.*, and that the plaintiffs had taken the remainder, and carried them to be sold, and that the proceeds had been received by the plaintiffs as executrix and executors; and he found that the plaintiffs, as executrix and executors, had no further claim; and that the defendant had not paid or secured to be paid to the plaintiffs the value of the said goods, but that they had good cause of action against him for the said sum of 55*l.* 3*s.* 6*d.*, to which however the defendant had a set-off of 30*l.* 0*s.* 1*d.*: And the arbitrator found that the declaration against the defendant was in assumpsit for work and labour done and materials found by the plaintiffs for the defendant, and for the value of goods and pigs sold and delivered by the plaintiffs to the defendants, and for &c. (the common money counts and the account stated between them). And the arbitrator did therefore award, that if this Court should be of opinion, upon the facts so found, that the said action for the recovery of the sum of 53*l.* 3*s.* 6*d.* is properly brought by the plaintiffs as executrix and executors as aforesaid, and the declaration properly framed to meet the said facts, then a verdict be entered for the plaintiffs for the sum of 25*l.* 3*s.* 5*d.*, and 40*s.* costs; but that if the Court should be of opinion that the action had not been properly brought by the plaintiffs as executrix and executors as aforesaid, or that the declaration had not been properly framed, then a nonsuit should be entered. And he further awarded as to the costs of the reference.

In Easter term last *Hoggins* obtained a rule calling upon the plaintiffs to shew cause why a nonsuit should not be entered; against which

*Joseph Addison* now shewed cause. It is said that the plaintiffs should have declared specially, and cannot recover in indebitatus assumpsit. The distinction which runs through all the cases, and which is perfectly well established, is this, that where the contract is executory, the plaintiff must declare specially, where executed, he may

recover upon an indebitatus assumpsit. Thus, where goods are sold upon credit, as soon as the period of credit has expired, the price of the goods may be recovered upon a count in indebitatus assumpsit; *Brooke v. White* (a), *Bull. Nisi Prius* (b), *Poulter v. Killingbeck* (c). [*Hoggins* here intimated, that the reason why the defendant alleged that the plaintiffs should have declared specially, was, that the money was to be paid to *Spedding*.] That circumstance would not cause this transaction not to be a sale by the executors. *Spedding* alone could not have maintained this action. All that was meant by the parties was, that after the sale and selection of the articles by the defendant, he was to pay the purchase money to *Spedding*, who was to distribute it amongst the creditors. It is precisely the same thing as if the defendant had refused the articles, and a stranger had bought the goods of the executors, with a stipulation that he was to pay the money to *Spedding* for the creditors. There are no special terms as to payment, except that the money is to be given to *Spedding*. The second contract is quite collateral to the written agreement; *Mayfield v. Wadsley* (d).

*Hoggins* in support of the rule. If the plaintiffs are the proper parties to bring this action, they should have declared specially. By the agreement in writing, the defendant is to receive the goods, and he is either to pay for them or to give security. A breach should have been assigned, that he had neither paid nor given security. The subsequent verbal agreement did not do away with the first; *Willoughby v. Backhouse* and *Marshall* (e), *Sells v. Hoare* (f). At all events, a breach should have been assigned upon the non-payment of the money to *Spedding*; *Guy v. Gower* (g).

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(a) 1 New Rep. 330.

(b) 139, b.

(c) 1 Bos. & Pull. 397.

(d) 5 Dowl. & Ryl. 224; S. C.

3 Barn. & Cress. 357.

(e) 2 Barn. & Cress. 821.

(f) 1 Bingh. 401.

(g) 2 Marsh. 273.

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DENMAN, C. J.—I think a verdict should be entered for the plaintiffs. The three executors agree to sell to the defendant, if he chooses to buy, and it is agreed that the money shall be paid to *Spedding*, as one of the executors. This latter stipulation appears to me like an agreement that the money shall be paid into the hands of a banker or bailiff. It does not make it the less a contract between the executors and the defendant. Besides, that agreement is not carried into effect, but another contract is entered into. Therefore, if under the former contract it was necessary to declare specially, under the latter it was certainly not so.

PARKE, J.—This is an action brought by the executors of *Pearson* for goods sold and delivered by them to the defendant, to be paid for them on request. Such a contract is, I think, established. *Spedding* is merely to be considered as the agent of the other executors. If *Spedding* had had a trust different from the other executors, it might have been necessary to have a special count.

TAUNTON, J. concurred.

Rule discharged.

DOE, on the demise of ISHERWOOD, v. ROE.

A notice at the foot of a declaration in ejectment, advising the tenant to appear and defend *in due time*, is insufficient.

THE declaration in this case was entitled “Michaelmas term, 4 *Will.* 4, 8th October, 1833.” The notice at the foot of the declaration advised the tenant to appear *in due time*. The affidavit of service stated that the tenant was personally served with the notice on the 8th of October, 1833.

*Joseph Addison* now moved for judgment against the casual ejector. In *Doe v. Roe*(a) it was held, that a notice of declaration in ejectment was sufficient, although the

(a) 1 *Crompt. & Jerv.* 330.

term in which the tenant was to appear was not specified. *Doe v. Graves* (a) is to the same effect. The declaration is sufficient, notwithstanding there be a defect in the title: *Goodtitle, d. Ranger, v. Roe* (b). [*Parke, J.* If I had been served with such a declaration and notice, I should not have known when I ought to appear.]

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By the Court.—If the form of the notice with regard to the period of appearance be disregarded, the notice will in time become useless.

Rule refused (c).

(a) 2 Chit. Rep. 172.

(b) Ibid.; *Anon.* ibid. and 173.

(c) In this Court, where the proceedings purported to be by original writ, the notice at the foot of the declaration very commonly directed the tenant to appear in the following term in the Court of King's Bench, not *at Westminster*, as is the form in the other courts, and here also when the proceed-

ings purported to be by bill, but "*wheresoever, &c.*" It seems rather unnecessary in a notice professing to inform the tenant what he is to do, to raise a doubt as to the county in which the Court will sit, merely because *process* by original is so worded; but this form appears to be still more objectionable now that proceedings by original are abolished.

#### The KING v. HEMING, Clerk.

IN Hilary term last, Sir *James Scarlett* obtained a rule calling upon the defendant to shew cause why a criminal information should not be filed against him. The affidavits stated that there was an election for members of parliament for the northern division of the county of Warwick, and at Nuneaton, one of the polling places for that division, very serious riots took place. The affidavits also disclosed a variety of circumstances tending to shew that the defendant, who was a magistrate of the county, had neglected his duty as a magistrate in refusing to call in the military, or to establish a sufficient civil force to suppress the riots, and

A magistrate is entitled to notice before an application is made for a criminal information, where he is charged with misconduct in his magisterial capacity, although other misconduct be also charged.

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had himself taken a part in the riotous proceedings of the mob.

*Campbell, S. G.* shewed cause, and objected that notice of the application had not been given to the defendant, who was charged with misconduct in his magisterial character.

*Sir J. Scarlett*, contra, submitted that this was as much a charge against the defendant as an individual as against him as a magistrate, and that therefore no notice was necessary.

*DENMAN, C. J.*—It is the established practice not to entertain a motion for a criminal information against a magistrate without giving him notice of the intended application. We think it is the duty of the prosecutor not to put the Court in the situation of violating this rule. The mixing up charges impugning the conduct of the party as a subject, and also as a magistrate, affords no ground for dispensing with the rule.

Rule discharged.

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The KING v. GREGORY.

Where a statute prohibits the erection of buildings within ten feet of a certain road, and directs that the footpaths shall be deemed part of the road,

a building erected within ten feet of the footpath is within the prohibition.

Where a statute makes the erection of a building within certain limits "a common nuisance," and also gives a summary remedy by proceedings before magistrates, the offender may be indicted for the nuisance.

**THIS** was an indictment for a nuisance, by continuing an erection or building by the side of a road leading from the south end of Blackfriars' Bridge to the Obelisk in St. George's Fields, and thence along the London Road to Newington, the said building being within ten feet of the said road, contrary to the provisions of 3 Geo. 4, cap. cxii. Plea: not guilty. At the trial before *Tindal, C. J.*, at the

last spring assizes for the county of Surrey, a verdict for the crown was taken by consent, subject to the opinion of this Court on the following case:

The road in question is one of the roads under the superintendence and controul of "The Trustees of the Surrey New Roads." It was set out and made under the provisions of 9 *Geo. 3*, cap. 89, and is, including the footpaths, of the width of sixty feet, the centre or carriage-way being forty feet wide, and the footways on each side ten feet. By 26 *Geo. 3*, cap. 131, sect. 34, certain distances are proscribed, within which the erection of buildings is prohibited. These distances vary in respect of different parts of the roads; and as to the road where the alleged nuisance is situate, it is enacted, "that no building shall be erected by any proprietor or occupier of the lands adjacent to such road within ten feet on either side of the said road; and if any such buildings shall hereafter be erected, contrary to the true intent and meaning of this act, the same shall be deemed a common nuisance."

By 3 *Geo. 4*, cap. cxii. sect. 126, the several distances within which buildings were prohibited by 26 *Geo. 3*, are recited, and it is enacted, that "no erection or building shall be erected, built, or continued by any such proprietor or occupier of lands adjacent to the said roads, or any of them, within the distances aforesaid, or any of them; and that if any such erection or building shall be hereafter erected, built, or continued, contrary to the true intent and meaning of this act, the same shall be deemed a common nuisance."

By sect. 125 of the same statute, "for the more speedy conviction of any such proprietor or occupier, and the removal of any such building," two justices are empowered to summon, and, upon proof, to convict such proprietor and occupier, and to make an order for the removal of such erection or building. The statute then gives an appeal to the quarter-sessions, whose decision is declared to be final; and provides, that "no order, verdict, assessment, judgment, or other proceeding made touching or concerning

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any of the matters aforesaid, or touching the conviction of any offence against this act, shall be removed or removable by certiorari, or any writ or process whatsoever, into any of his majesty's courts of record at Westminster."

This indictment is preferred by the trustees appointed by virtue of the above-mentioned acts of parliament.

The alleged nuisance is situate on land on part of which, in 1791, a chapel was erected, and the remainder inclosed for the purpose of a burial-ground by a high brick wall, which immediately adjoined the footpath. The chapel itself was built several feet within this inclosure, and the space between the front of the chapel and the footpath was occupied by a portico and flight of steps leading to the chapel, the foot of the steps being in a line with the brick wall by which the burial-ground was inclosed. In this state the property continued from 1791 to 1830, when it passed into the hands of the present proprietor, who erected two new houses on part of the burial-ground, the fronts of which houses ranged with the front of the chapel. To one of these houses the defendant made an addition, which is the nuisance complained of. The brick wall has been pulled down to the level of the ground, and on the same foundation an open shop-front has been placed, and a roof added, which connects the shop front with the front of the newly built house. The shop thus formed is not higher than the brick wall was, nor does it project beyond the line upon which the brick wall formerly stood, and upon which the portico and steps of the chapel always have been, and still are. The footpath itself is of the uniform width of ten feet; and that space is now left clear between the front of the shop and the carriage road.

Soon after the above alteration was made, the trustees of the road complained of it as an infringement of 3 Geo. 4, and applied to two justices to abate it as a nuisance under the provisions of that statute; but the justices declined to do so, and the trustees preferred the present indictment, and removed it by certiorari into this Court.

It is agreed that the prosecutors or defendant may refer to any of the clauses in the acts of parliament above recited, or to any other acts, local or general, which they may consider applicable to the case.

The questions for the opinion of the Court are, first, whether, under the circumstances herein stated, the trustees could legally prefer the present indictment, and remove it into this Court; secondly, whether the alteration made in the property, as herein described, constitutes it a building within the meaning of the above-mentioned acts; and thirdly, whether, if it be a building within the meaning of those statutes, it is or is not within the distance of the road proscribed by the said statutes.

*The tiger* for the crown. I. As to whether this is or is not a building, there is a difficulty in making this clearer than the statement in the case itself. It is erected upon a foundation, and has a roof.

First point:  
What, a building.

II. Assuming this to be a building, the next question is, whether it is within the proscribed distance. By 9 *Geo. 3*, cap. 89, authority is given to lay out a road *sixty feet* wide. By another section of that act, it is enacted, "that no building shall be erected by any proprietor or occupier of lands abutting upon or adjacent to the said road, within ten feet of the said road; and if any such building shall be erected contrary to the true intent and meaning of this act, the same shall be deemed a common nuisance." It seems quite clear that it was the intention of the legislature that the whole road should be sixty feet wide, and that no proprietor was to build within ten feet; so that the open space might be eighty feet. The ten feet may be inclosed by railings, but it must be free from buildings. This provision was continued by 26 *Geo. 3*, cap. 131, sect. xxxiv.; 38 *Geo. 3*, cap. xxviii., and 3 *Geo. 4*, cap. cxii. sect. 126. The 116th section of this last act provides, that the foot-paths on the sides or adjoining to the said roads shall be part of the roads, and shall be repaired by the trustees.

Second point:  
Distance from road, how computed.

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This clause is merely introduced out of abundant caution, and renders the question free from all doubt, as the foot-paths are expressly declared to be part of the road. This building is erected within the proscribed limits, and is therefore a nuisance.

Third point:  
 Remedy by in-  
 dictment.

III. Then as to the last question, whether the trustees have pursued the proper remedy, it will be contended that inasmuch as before the passing of these acts, it was no offence at common law to build within the proscribed limits; and as by 3 Geo. 4, cap. cxii. sect. 128, a proceeding before the magistrates is pointed out, an offender against this act can be punished in no other mode than by that pointed out by the statute. But section 126 of the same act makes an erection within the proscribed distance a common nuisance, and this is a substantive enactment. In *Rex v. Wright (a)*, Denison, J. is reported to have said, that "where an offence is not so at common law, but made an offence by act of parliament, yet an indictment will lie where there is a substantive prohibitory clause in such act of parliament, though there be afterwards a particular provision and a particular remedy given. But it is otherwise where the act is not prohibitory, but only inflicts the forfeiture and specifies the remedy." The same distinction is recognized by Ashhurst, J. in *Rex v. Harris (b)*. *Rex v. Dickenson (c)*,

First point.

*Redkin*, contra. If this indictment could be sustained, the trustees would be authorized not only to remove the building complained of, but also the portico and steps of the chapel itself, which, after forty years' quiet enjoyment, could hardly be contended for. The building complained of cannot be essentially distinguished; the ground is no more inclosed; there is the same passage left for the public; and all that has been done is to substitute an open shop window for what was blank wall. With respect to

(a) 1 Burr. 545; post, 485.

(c) 1 Wms. Saund. 135 b, note 4.

(b) 4 T. R. 202.

the fact of its having a roof, the same may be said of the portico, or even of a verandah over a balcony. [*Denman, C. J.* You must shew that the *portico* was not a nuisance!] The building to be a nuisance must be a substantive erection. The building act makes it an offence to build within a certain distance of the road, yet it is not an offence within that act to make an addition to a building. The words of the act in this case are distinct, and refer to buildings, and not to additions to buildings. [*Denman, C. J.* Your argument will go to this, that a party might build a whole house on the road as an addition to a small building *adjoining* the road.] A party has a right to inclose his own land. The argument on the other side would go to shew that a party might not build a wall. [*Parke, J.* A wall would not fall within this description of a building (a). This was decided in a case from Yorkshire.]

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II. Upon the second point, as to the distance within which buildings are prohibited, the 9 *Geo. 3*, c. 89, certainly directs that a road shall be made sixty feet wide; but this is an indictment under 3 *Geo. 4*, cap. cxii. When that act passed, a road, in the popular sense of the word, had been made forty feet wide, with a footpath ten feet wide, which is the exact space within which buildings are prohibited on each side of the road. It is submitted that the word 'road' is here used in its popular sense, and that it was intended to prohibit the building within ten feet of the *carriage road*. These acts contain provisions which are inconsistent with a contrary supposition. The 116th section (b)

(a) Great practical difficulties have arisen in ascertaining what should be admitted as a *building*, qualifying the occupier to vote under the 27th section of the Reform Act (2 *Will. 4*, c. 45).

(b) "That all and every the footpaths, on the sides of or adjoining to the said roads by this act authorized to be repaired, shall

be, and the same are hereby declared to be subject to the regulations of this act, and to be part of the said roads, and shall be repaired and amended by the said trustees, by such ways and means and in such manner as the said roads are and shall be repaired and amended."

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of 3 Geo. 4, c. cxii. which has been referred to, distinguishes the footpaths from the roads. [*Parke, J.* That section is only declaratory.] It does not make the footpaths part of the road for all purposes, but only for the purpose of repair. By the 119th section a penalty is inflicted on any person riding on the footpaths. If therefore the footpaths are to be taken as the road, a person is liable to a penalty for riding on the road. [*Patteson, J.* That section, which declares that the footpaths are to be deemed a part of the road, appears only applicable to a particular purpose.] In the 110th section there is a provision that the surveyor may remove all annoyances on any part of the roads or on the footpaths on the sides thereof, and may have any drains running along or near the side of the road. In the 111th section (a) is a clause for regulating and

(a) "That the said trustees shall and may at any time, and from time to time, cause notice to be given to the respective owners or proprietors, feoffees, trustees, lessees, tenants, or occupiers of the several houses, shops, warehouses, stables, buildings, courts, yards, gardens, lands, tenements, and hereditaments, on the sides of the said roads, to take down, fill up, remove, alter, or regulate all signs, or other emblems used to denote the trade, occupation or calling of any person or persons, and all sign-posts and signs, irons, bow-windows and projecting windows, show-boards, window-shutters, flaps, water-spouts, doors projecting over, on, or upon any part of the said footpaths or sides of the said roads, and also all outer doors opening on and steps projecting into the footpaths, and all doors and steps leading down out of the footways into any cellars, vaults and other places belonging to any

building, shop, warehouse or tenement, and other annoyance whatsoever on the said footpaths or sides of the said roads, and to cause all signs and other emblems as aforesaid, or such parts thereof as the said trustees shall think fit, to be affixed and placed on the fronts of the houses, shops, warehouses or buildings, whereunto the same respectively belonged or were before affixed, and not otherwise; and in case the owners or proprietors, feoffees, trustees, lessees, tenants or occupiers, shall refuse or neglect to do as before directed, for the space of thirty days next after such notice shall be given to him, her or them respectively (which notice shall be given in writing or print, &c.) it shall be lawful for the said trustees to cause such signs or other emblems, and other matters and things hereinbefore mentioned, and all other annoyances whatsoever, to be taken down, carried away, filled up or

removing signs, bow-windows, window-shutters, &c. projecting over or upon any part of the roads or footpaths. These two clauses shew that the legislature distinguished the footpaths from the roads; and the latter of these clauses is quite inconsistent with a supposition that the legislature contemplated that there should be ten clear feet between the houses and the footpaths.

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III. In *Rex v. Wright (a)*, Lord *Mansfield*, C. J., says, Third point.  
 "I always took it that where new created offences are only prohibited by the general prohibitory clause of an act of parliament, an indictment will lie. But where there is a prohibitory particular clause, specifying only particular remedies, there such particular remedy must be pursued; for otherwise the defendant would be liable to a double prosecution; one upon the general prohibition, and the other upon the particular specific remedy. The proceeding in this case is within the inconvenience and mischief contemplated by Lord *Mansfield*."

*Thesiger*, in reply, was stopped by the Court.

DENMAN, C. J.—I really cannot entertain a doubt upon this case. It is clear that this erection is a *building* within First point.  
 the meaning of the act. It is also clearly erected within Second point.  
 the prohibited distance. The act says distinctly that there shall be a road sixty feet wide, and that no building shall be erected within ten feet of that road. I know of no Third point.  
 reason why the parties should not proceed by indictment: for although a power is given to proceed in a summary

removed, altered and regulated, in such manner as they shall think proper, and shall return or cause to be returned to their respective owners, or to be left on the spot or as near as conveniently may be, for such owner or owners, so much of such signs or other projections or annoyances whatsoever as shall not be affixed or put up, or otherwise made use of in the alterations; and the charges and expenses attending the same shall be reimbursed to the said trustees, and be paid and payable by the respective tenants or occupiers of such houses and premises."

(a) *Ante*, 482.

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manner before the magistrates, yet there is a clause which declares the offence to be a common nuisance.

First point.

PARKE, J.—I think this is a very clear case. With respect to the first point, I think this is a building within the meaning of the act, and that the statute did not mean to make any difference between a *building* and an *addition* to a building. The next question is, whether it is built within the prohibited distance. Looking at the act, it is clearly within the prohibited distance. That act requires that there shall be eighty feet clear of building. Here there is only sixty feet. A doubt was for a moment raised in my mind by the 111th section: but upon the whole I am satisfied that this is a building within the proscribed distance. As to the second point I entertain *no* doubt.

First point.

TAUNTON, J.—I am of the same opinion as to the first question, whether this is a building. It is found to be an open shop. It makes no difference whether it is an open shop, like a broker's, or a common shop. In either case it is, in my opinion, a building. The second question is, whether it is a building within the prohibited distance. By 9 *Geo. 3*, c. 89, it is provided that the road shall be sixty feet wide. It is not said how much of this space shall be used as a carriage road and how much as a foot road. It merely provides that the road shall be sixty feet wide. Then the same statute enacts, that no building shall be erected by any proprietor within ten feet of the said road. If there had been nothing more than this provision, if any building had been erected within ten feet of the road of sixty feet wide, it was within the prohibited distance. Then, by a section of 3 *Geo. 4*, cap. cxii. it is provided that the footpaths shall be deemed part of the roads. At this time the sixty feet had been divided into a carriage road and foot road; the carriage road was forty feet wide, and ten feet on each side was made into a footpath. To make the matter certain, the statute declares

Second point.

that the ten feet on each side shall be deemed *part of the road*. The whole is one road, whether used for carriages or by foot passengers. This is a building within ten feet of that road, and is therefore within the prohibited distance. It is argued that the 111th section provides for projections *over the footpaths*, and that therefore the footpaths are distinguished from the road, and that a building may be erected within ten feet of the footpaths. The section speaks of sign-posts and bow-windows. Formerly sign-posts projected half way across the street, and bow-windows might possibly be brought forwards more than ten feet. I cannot therefore say that this section necessarily implies that these ten feet are not to be from the road, the footpaths being included in the term road. Then it is said that a particular remedy is pointed out by the statute. The answer to that is, that there is a clause in the statute which declares this to be *a common nuisance*. It follows necessarily that there is a right to indict the party for this offence, although the statute may have given cumulative remedies.

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Third point.

PATTESON, J. concurred.

Judgment for the Crown.

The KING v. ROBERT JEFFERSON, Esq.

**W**IGHTMAN had obtained a rule calling upon the defendant to shew cause why an information in the nature of a quo warranto, should not be exhibited against him, to shew by what authority he exercised the office of trustee of the port, harbour, and town of Whitehaven.

By 2 *Geo. 3*, c. 87, (altered and enlarged by 56 *Geo. 3*, c. xlv.) it is provided that after the first Friday in August, 1769, and from thenceforth for ever thereafter on every first Friday in the month of August, in every third year successively, fourteen persons shall be chosen by ballot, by the inhabitants at the town of Whitehaven, at the time of

To impeach the election of a party returned as elected, it is not sufficient to allege that many of his votes were bad and fictitious, without shewing that some other candidate had a majority of legal votes.

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such election, dealing, by way of merchandise, in the goods subjected to the payment of duties as in the said several acts mentioned, or any of them, or being master, or having any part or share, not less than one sixteenth, of any ship or vessel then actually belonging to the harbour of Whitehaven; and that all and every such person or persons so to be elected and chosen as aforesaid upon the said first Friday in the said month of August, 1769, and from time to time and at all times for ever thereafter, after such their election, to be had in manner aforesaid, together with Sir *James Lowther*, his heirs and assigns, lords of the manor of St. Bees for the time being, and six other persons to be likewise nominated and appointed by the said Sir *James Lowther*, his heirs and assigns as aforesaid, by any writing or writings under his or their hand and seal, are to be trustees for carrying the said several acts into execution.

On Friday the 3d of August, 1832, an election of the fourteen trustees, by ballot, took place. About 1460 persons voted, and the defendant stood second on the poll, Lord *Lowther* having 1030 votes, the defendant 578.

The rule nisi was granted upon affidavits, which stated, that if those persons only who were duly qualified had voted, *the defendant would not have been elected*; that a great number of those who did vote (naming them) were disqualified; and that many persons had been improperly qualified as voters the day before the election.

The affidavits filed by the defendant alleged, on the other hand, that two lists of trustees were made out previously to the election by the two parties in the town, and that many of those who voted for the other list were disqualified.

Sir *James Scarlett* now shewed cause. The applicant does not state how many disqualified voters voted for the defendant. It may be that the bad votes were given to the person who applies for this information.

*Coltman*, (with whom was *Wightman*), in support of the

rule. There must be some mode of inquiring into the validity of an election by ballot. It is shewn that the majority of persons who voted at this election were disqualified; it is therefore impossible to say that the election is good. If a quo warranto issue, the party in possession of the office will have to prove that he was duly elected. There is in this case no previous mode of inquiring who are entitled to vote. The returning officer may admit or exclude whomsoever he likes; and unless this application be granted there will be no mode of overhauling his proceedings, and a person who had not one good vote may be declared elected.

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DENMAN, C. J.—The applicant has not made out a *prima facie* case; for it does not appear who was duly elected. It would be easy for the parties to make an arrangement to point out the votes which are alleged to be bad. If gross misconduct were shewn on the part of the returning officer that would raise another question.

Rule discharged.

DOE, on the several demises of ELIZABETH GRIFFITH, SUBANNAH EVANS and HUMPHRY EVANS, v. PRITCHARD and others.

**EJECTMENT** for a messuage and lands in the parish of Llanfau, in the county of Merioneth. At the trial before Bayley, B., at the Bala spring assizes, 1833, a verdict was found for the defendants, subject to the opinion of this Court on the following case:

25th February, 1775.—By an indenture of lease (with livery of seisin) made between *Richard Price Thelwall* of the one part, and *Evan Griffith* of the other part, R. P. A freehold interest is not divested out of an attainted felon until office found. Under a demise by the felon after attainer, the lessee has a good title against all but the king and the lord of whom the land is holden.

Such felon is therefore a good lessor in ejectment.

A right of re-entry is waived by acceptance of the reserved rent, though from a stranger.



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*Thelwall* demised unto *E. Griffith* the premises in question, with certain exceptions and reservations, to hold unto *E. Griffith*, his heirs and assigns, from the day next before the day of the date thereof, for and during the natural lives of *E. Griffith*, *Humphry Evans* (his son), and *Elizabeth Evans* (his daughter), and the life of the survivor of them, at the yearly rent of 20*l.*, payable to *R. P. Thelwall*, his heirs or assigns. The lease contained a clause of re-entry in case of nonpayment of rent for the space of twenty days (the same being first lawfully demanded), and also covenants by the lessee, for himself, his heirs, executors, &c. for the performance of the usual and customary services, with a proviso "that in case *E. Griffith*, his heirs and assigns, shall at any time hereafter grant, demise, set, let, or assign over the demised premises, or any part thereof, or deposit, pledge or mortgage this present lease as a security for any sum or sums of money (without the consent in writing of *R. P. Thelwall*, his heirs or assigns, being first had and obtained) to or with any person or persons whatsoever; or in case the said *E. Griffith*, his heirs and assigns, shall hereafter, during the continuance of this lease, happen to become insolvent, and unable in circumstances to go on with the management of the said farm and demised premises, then, and in any of these cases, this present demise, and every matter and thing herein contained, from thenceforth shall cease, determine, and be absolutely void, to all intents and purposes whatsoever." Covenants by *R. P. Thelwall*, his heirs or assigns, for quiet enjoyment, the lessee paying the rent and performing the covenants.

1st April, 1797.—*E. Griffith* died seised, and his heir, the said *H. Evans*, became special occupant.

April, 1801.—At the Merioneth great sessions, *H. Evans* was convicted of felony, and transported to New South Wales for life. No inquisition was taken, and no office found for the crown of the lands and tenements of *H. Evans* on his conviction and attainder; nor has any entry been made on behalf of the crown.

After the departure of *H. Evans*, the premises were occupied and the farm managed by *Elizabeth Griffith*, the widow of the lessee and the mother of *H. Evans*, until her death, in March, 1812. *Susannah Evans*, the daughter of the said *Evan* and *Elizabeth Griffith*, and sister of the said *H. Evans*, continued in possession and management of the farm until the death of *Elizabeth Evans*, the last cestui que vie, 24th January, 1816. During the whole of this period the reserved rent was regularly paid to the reversioner, who had full knowledge of the conviction of *H. Evans*. Immediately after the death of *Elizabeth Evans*, *Richard Watkins Price*, to whom the reversion had come by devise, supposing the estate to have been determined by the deaths of the several cettueux que vies, let the premises at an increased rent of 40*l.* to *John Evans*, another son of the lessee, then residing on the premises with his sister *Susannah*. *John Evans* occupied until July, 1819, when *R. W. Price* brought an ejectment on that letting, and recovered possession.

*H. Evans* was alive on the day of the demise laid in the present declaration, a convict in the colony of New South Wales.

The questions for the opinion of the Court are, first, First point. whether the estate of *H. Evans* was divested by his attainder and conviction without office or entry: secondly, Second point. whether, if the estate was not divested, *H. Evans* had capacity to demise on the day of the demise laid: thirdly, Third point. whether the estate was determined by breach of that part of the proviso in which it was stipulated, that in case the lessee, his heirs or assigns, should thereafter, during the continuance of the lease, happen to become insolvent, and unable in circumstances to go on with the management of the said farm and demised premises, then that demise should cease and determine.

If the Court shall be of opinion that *H. Evans* had capacity to demise, and that the lease was not determined

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by any breach of the proviso above set forth, then the verdict is to be entered for the plaintiff.

*J. H. Lloyd*, for the plaintiff.

First point:  
Estate of felon  
not divested  
without office  
or entry.

I. It is submitted, that the estate of *H. Evans* was not divested without office found. [*Campbell*, S. G. contra, admitted this, but said that he relied upon the right of entry in the king as incapacitating *H. Evans* from demising.]

Second point:  
Capacity of  
felon to de-  
mise.

II. The second question seems to be a mere corollary to the first, and is therefore conceded with the first. It is admitted that the freehold does not vest in the crown without office found. In whom then does it remain? The lord cannot have it, for he takes only by escheat after the king has taken his year, day, and waste. It must then continue in the attainted person; and so it was held in *Nicholls v. Nicholls*(a), where it was said(b), "that after the attainder, and until office found, the freehold and the fee-simple should be, in fact, in the person attainted as long as he should live; for as he hath capacity to take(c) in tail lands by a new purchase, so he hath power to retain his ancient possessions, and he shall be tenant to every præcipe." Save as against the king, who certainly has an inchoate right, which may be perfected by office found, his title is good against all the world. If he be capable of holding, it follows as a necessary consequence that he has a power to grant his interest to another. This interest is, it is true, defeasible in his own hands, and in those of his grantees; but still is defeasible only upon office found for the king. In *Shepp. Touchst. Grant*, 232(d) it is said "a person attainted of treason or felony may give or grant his land, and this is good against all others besides the king and the lord of whom his land is held." To this a query is added by *Mr. Preston*, in his edition of *Sheppard's Touchstone*.

If an alien have land, the king may seize it after office found; yet where "*A.*, an alien, had lands by purchase in

(a) Plowd. 477.

(b) *Ib.* 486.

(c) *Post*, 496.

(d) *Post*, 501.

tail, remainder to *B.* in fee, *A.* suffered a common recovery, and died without issue. This being found by office, the whole Court held that the recovery was good, and should bind the remainder(a).” Upon the same principle it is clear, that although the courts cannot recognize his capacity to *sue*, the attainted person has power to *grant*. In *Watkins’s* edition of *Gilbert’s Tenures*(b), *Mr. Watkins* says, that though a lease (of copyhold lands) for several years, without licence or special custom, is clearly a cause of forfeiture, yet the estate of the copyholder continues till the lord actually enters, or otherwise takes advantage of it as such; and that the lease may well be considered good as to every one but the lord, who, it is true, may enter and defeat it if he will. The present case is precisely analogous to that put by *Mr. Watkins*: This title is defeasible; but third parties cannot take advantage of the king’s title. The king may have a right at any future period (for nullum tempus occurrit regi) to have an office found; but the crown having not chosen to exercise this right, having, if not waived, at least suspended its claim, shall a third party, in a matter arising entirely between himself and the person having the defeasible estate, object to the title of his adversary, that the king has a superior title?(c) The estate of

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(a) 2 Vin. Abr. 259, tit. *Alien*, pl. 18, vouching *Anon.* 4 Leon, 84; *Gouldsborough*, 102; and referring in the margin to 10 Mod. 124, (arguendo in *Fleetwood v. Thorney*).

(b) Note 92.

(c) “The king shall have execution where his title appears of record in pleadings between two subjects, although he be not party to the suit: T. 11 H. 4, fo. 71 b, per three justices; M. 12 H. 7, fo. 12 a; T. 16 H. 7, fo. 12 a; F. N. B. 34 H. 38 E. 153, E. F.; *Willian v. Berkley*, Plowd. 243; *Brownloe v. Mitchell*, 1 Roll. Rep. 206, 208; *Chancellor, &c. of Cambridge v. Walgrave*, Hob. 126, 127; *Colt v. Episc. Coventr.* ib. 140,

163; *Cumber v. Episc. Cicestrens.* Cro. Jac. 216; *Yates v. Dryden*, Cro. Car. 589, 590. So, in equity, *Barclay v. Russell*, 3 Ves. 436.

“If a presumption of title only appears for the crown, the Court will in some cases proceed to give judgment in the action, but will suspend execution until the party has interpleaded with the king: T. 29 E. 1, Memoranda in *Scaccario*, 42, 43, *Adam Penreth’s case*.” Mann. Exch. Pract., Revenue Branch, 2d edit. 126. And see *ibid*, 94, 188, 190 n., 265 n.; *E. Strange’s case*, Lib. Ass. anno 1, fo. 1, pl. 1; 18 Vin. Abr. *Rege inconsulto*.

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Third point:  
Breach of pro-  
viso.

freehold can only be defeated by some act. It is submitted that if the estate remain in the attainted person, it retains all the incidents of tenure.

III. To the argument, that the estate is determined by a breach of this proviso, there are several answers. This proviso operates to make the grant for lives defeasible on a particular contingency,—in case the party shall happen to become insolvent, and incapable of managing the farm. Conditions for forfeiture are to be construed strictly. It is said by Lord *Coke* (a), “*Conditio beneficialis, quæ statum construit, benignè secundum verborum intentionem est interpretanda; odiosa autem, quæ statum destruit, strictè secundum verborum proprietatem est accipienda.*” There are numberless authorities to shew that the courts will lean against forfeitures, many of which are summed up in *Adams on Ejectment* (b). In *Doe, d. Abdy, v. Stephens* (c), Lord *Tenterden* says, “It is a general rule that the words of a covenant must be taken most strongly against the covenantor, and that rule applies more strongly to a proviso for re-entry which contains a *condition* that destroys or defeats the estate (d).” First, it is submitted that the *contingency did not happen*. What is the true construction of this proviso? It is evident that such circumstances as those of the present case were never contemplated. By *insolvency* was meant only a pecuniary embarrassment, ending probably in bankruptcy. It must be admitted that, upon conviction, the goods of the convict were instantly forfeited to the crown; but as the crown did not seize, they remained in the possession of the convict. Therefore the conviction did not affect the party’s pecuniary ability to carry on the business; and it is a *pecuniary*, and not a *personal* disability, which is contemplated by the proviso. The lease is to determine in case he shall “become insolvent, *and* unable in circumstances to go on with the management of the said farm.” The party might still carry on the

(a) Co. Litt. 218 a.

(b) 3d edit. 136.

(c) 3 Barn. &amp; Adol. 299.

(d) Ibid. 303. *Qu. whether the rule here laid down is not favourable to the creation of forfeitures.*

business by his bailiffs and servants, or even by his under-tenants, if the lord did not enforce the forfeiture incurred by underletting. The Court will not, in the absence of evidence of inability in circumstances, infer it from the legal liability to seizure of the goods on the farm; indeed the regular payment of rent from 1801 to 1816 negatives such a supposition. The contingency, therefore, upon which the estate was determinable never did happen.

If, however, the contingency happened at all, it happened at the instant of the conviction, and therefore the acceptance of rent after that time, with a full knowledge of the facts of the conviction, operated as a waiver of the forfeiture, which it is clear the lord might waive, or not, at his option, the lease being voidable only. It may, perhaps, be contended that this is a continuing breach; but this is not so, for the proviso says "shall become," and not "shall be" insolvent, &c. And even if it were a breach in its nature continuing, yet the lord cannot now enter, for by acceptance of rent after breach, he has waived the *condition*, and not merely the forfeiture, and thus has made the lease absolute: *Co. Lit.* 211 b. (a) [*Taunton, J.* There is a great difference between a waiver of the breach and a waiver of the covenant or condition altogether. In modern times the Courts have generally considered, that a waiver of the breach is not, as was held in *Dumpor's case* (b), a waiver of the covenant, *Doe, d. Boscawen, v. Bliss* (c); and that where there is a continuing breach, the lord may enter, and bring ejectment, notwithstanding an acceptance after the condition broken.] In all the cases which have been so decided, the continuance of the lease depended upon acts to be done by the lessee, who sought to take advantage of an original breach of condition before an acceptance of rent, and it would be allowing them, contrary to a known principle of law, to take advantage of their own wrong, if they were permitted to set up this breach: *Doe, d. Bryan, v.*

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Second point :  
Waiver of forfeiture.

(a) 2 Tho. Co. Litt. 102.

(b) 4 Co. Rep. 120.

(c) 4 Taunt. 735. And see 4

Mann. &amp; Ryl. 304, note.

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Third point :  
Necessity of  
entry.

*Bancks*(a); *Ambler v. Woodbridge*(b); *Roberts v. Davey*(c). The reason does not apply here. The forfeiture is to take place upon a particular contingency, and which, so far as the committing the felony was concerned, was beyond the controul of the lessee.

But assuming that there was a *continuing* breach, there was no entry by the lessor such as to divest the estate. The condition made the demise *voidable* only, and not absolutely void, and therefore some act should have been shewn by which the lord declared his option to avoid the lease; and as this is a freehold lease, with livery of seisin made, it could only be avoided by actual entry for the declared purpose of taking advantage of the forfeiture. That was not done here. The lessor entered thinking that all the cettoux que vies were dead, and took possession of his reversion: he then re-let the premises, and subsequently brought his ejectment and recovered possession. Neither of these acts indicates an intention to avoid the lease for "forfeiture." Lord Coke says (d), "In case of feoffment, which passeth by livery of seisin, there must be a re-entry by *force of the condition* before the state be voyd." *Doe, d. Tarrant, v. Helier*(e), is a strong confirmation of this position, and particularly the judgments of *Ashhurst, J.* and *Buller, J.* [*Taunton, J.* It will be admitted that to avoid a freehold lease, there must be an entry. It will also be admitted, that in the case of a fine, there must be at the time of entering a *claim*, that is, the entry must be made *animo clamandi*. But is there any case which shews that an entry to avoid a fine and an entry to avoid a freehold lease are the same, and that in the *latter* case the party entering must make claim? *Parke, J.* In the case of a fine, it is only necessary that the entry should be with *intention* to claim (f).] In *Roberts v. Davey*, *Parke, J.* says, "There must be something to shew that *Stephen Eusticke*, or some one under him,

Entry to be  
made animo  
clamandi.

(a) 4 Barn. &amp; Alders. 401.

(d) Co. Litt. 208 a.

(b) 4 Mann. & Ryk. 302; 9  
Barn. & Cressw. 376.

(e) 3 T. R. 167.

(c) *Ante*, vol. i. 443.(f) And see *post*, *Doe d. Jones*  
*v. Williams*.

made his election to accept the forfeiture." [*Purke, J.* That was not a case of a freehold lease. The party by entering in this case has shewn his intention to accept the forfeiture.] It is stated in this case that he entered as upon his reversion; therefore his entry cannot be assumed to have been with a view of electing to avoid the lease: *Pennant's case* (a).

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It is very doubtful in this case whether *Price* could enter for the forfeiture. He could not enter for a breach which happened before the commencement of his reversionary estate, for the right of entry which accrued by the antecedent breach did not run with the land, and it does not appear upon the case when the reversion was vested in him. Unless his estate commenced before the conviction in 1801, or unless there was a breach continuing until 1816, when he appears to have been seised of a reversionary interest, he cannot claim in respect of this forfeiture. It lay upon the other party to shew when his estate accrued to him. •

Entry by assignee of reversion in respect of forfeiture committed before assignment.

*Campbell, S. G.* contra, in support of the rule.

I. It is not intended to rely upon the first point. It is admitted that *H. Evans* took a freehold estate, though he came in as special occupant (b), which estate could not be divested without office found. The 33 *Hen. 8, c. 20*, which enacts that in cases of *treason* the king shall have the lands of the attainted person without office found, shews that at common law the estate is not divested until office found.

First point.

II. The attainted felon is incapable of making a demise, The evidence shews that *H. Evans* is still a convict unpar-  
 doned. By the statute de prerogativa regis (c), the king is entitled to the year, day and waste of the lands of a felon attainted; that is, he is entitled to the profits, and therefore to the possession, for a year and a day, although the freehold may remain in the felon. There is no case to shew that the crown may not have the right of possession before office

Second point.

(a) 1 Wms. Saund. 287 d.

*binson*, 2 Mann. & Ryl. 263 (b).

(b) As to the rights of a special occupant, see *Doe d. Jeff v. Ro-*

(c) 17 *Edw. 2, (c. 16)*, as to which see 3 Mann. & Ryl. 337, n.



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found. If the right of possession be in the crown before office found, the convict cannot make entry; and he cannot demise, not having a right of entry in him.

Civil death.

*H. Evans* was, after his conviction, civilly dead; and although the freehold remained in him, he might be, and was incapacitated from transferring it to another, and his demise of it would be absolutely void, not only as against the king, but as against all parties. *Bullock v. Dodds* (a) shews that a convict transported beyond seas is, during the period of transportation, still civiliter mortuus (b), and incapable of dealing with property. *Doe d. Evans v. Evans* (c), is strong to shew, that although the freehold might be in *H. Evans*, he was yet incapable of leasing. He is disabled from bringing ejectment as long as he remains a convict felon, which in this case will be until his death.

Third point.

III. There was a forfeiture, which could not be waived, and was not waived; there was a continuing breach, and a valid entry to determine the estate.

The condition, or, as it should perhaps rather be called, the covenant, has been broken and a forfeiture incurred. A conviction, ipso facto, works a forfeiture of all goods and chattels of the convict without office found. Moreover, he is incapable of holding any personal property which he may acquire afterwards, for these again are forfeited to the crown without office; *Bullock v. Dodds*. This circumstance, together with that of his transportation, rendered *H. Evans* insolvent, and unable in circumstances to go on with the management of the farm.

(a) 2 Barn. & Alders. 258.

(b) Some ambiguity appears to attach to the expression "civil death." As applied in its unqualified and proper sense, to persons who are mortui sæculo by having become professed in a religious community, it implies a total disability to take or hold property, real or personal; the former of which vests at the moment of profession, without more, in the heir of the party—the latter in his ex-

ecutors. Such a party is of course incapable of dealing with property. It does not however seem necessarily to follow that a person who retains so much civil life as to be capable of holding until office found, should, because he is said (in a less proper sense) to be civiliter mortuus, be therefore incapacitated from all dealing with the property so remaining in him.

(c) 8 Dowl. & Ryl. 399; 5 Barn. & Cressw. 584.

Another objection raised is, that this is not such a condition that the assignee of the reversion could take advantage of a breach committed before the assignment to him. If the breach touches the land he may do so. This condition affects the management of the farm. It is not stated at what time *Price* became the assignee of the reversion, but it is open to the defendant to contend that this was a continuing breach, and that *Price* might take advantage of it on becoming entitled to the reversion; *Co. Lit.* 215 *a*.

What are the words of the condition? "In case the said *Evan Griffith*, his heirs and assigns, shall hereafter, during the continuance of this lease, happen to become insolvent, and unable in circumstances to go on with the management of the said farm." Suppose it had said "shall at any time or times hereafter, during the continuance of the lease" &c., this would have made it a condition of which there might be a continuing breach. Surely it can make no difference, that the words, "at any time or times" are not introduced. It was as important for the lessor to have a solvent tenant during every succeeding year as at the first. None can be more insolvent than a party who has no property and can convey none.

There was no waiver of forfeiture by acceptance of rent. It is doubtful whether this condition is such that the forfeiture *could* be waived by acceptance of rent. In *Co. Lit.* 215, *a*. it is said, "And it is to be observed, that when the estate or lease is ipso facto void by the condition or limitation, no acceptance of the rent after can make it to have a continuance." But supposing that this is a lease *voidable* only upon breach of the condition, and that therefore the forfeiture may be waived by acceptance of rent, it can only be by acceptance of rent *from the lessee*, and without any mistake of law or of fact. [*Parke J.* It is found that he had knowledge of the breach of the condition. A mistake of law, where a party is acquainted with the fact, is nothing (*a*).] But the acceptance of rent was not from the lessee. There was no privity of estate between the

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(a) *Vide ante*, 304.

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lessor and those who paid the rent. This was an acceptance of rent from the hands of a stranger. [*Parke, J.* There was an acceptance of rent *under the lease*. *Denman, C. J.* The rent paid was the *reserved* rent.] It was no payment by *H. Evans*, or on his account, although it is true that the rent paid was of the same amount as the rent reserved. Although it is stated that the person entitled to the reversion had knowledge of the conviction, he does not appear to have been at all aware that the conviction produced a forfeiture, and indeed such a supposition is contradicted by the facts stated. This ignorance of the law shews, and there are other facts which shew that the reversioner did not by acceptance intend to waive the forfeiture. [*Taunton, J.* It is a well-established rule that acceptance of rent under the lease is a waiver of a forfeiture antecedently incurred. We cannot make any inference as to what was the secret motive of the lessor who accepted the rent; and this has never been a question in cases of this sort. *Parke, J.* He intended to accept rent as rent *due under the lease*, and that admits the continuance of the lease. Suppose he had distrained, that would have been a waiver, and yet there would have been no more mutuality between the reversioner and the tenant *per auter vie*, than here.] With regard to the entry, it must be admitted that a mere walking across the land would not be such an entry as would divest the estate of the lessee, but it is sufficient if he enter with the intention of claiming possession. [*Taunton, J.* There must be some declaration or act done as evidence of that intention.] He entered and subsequently brought ejectment, and has since been in possession. The bringing the ejectment, of itself is evidence of the *animus clamandi*. [*Denman, C. J.* I believe we all think that your *entry* was sufficient.]

*Lloyd*, in reply. The admission which was made by the defendant, upon the first point, has been in part retracted, but the qualification does not affect the right of the plaintiff. It is still admitted that the freehold is in the parties at-

tainted until office found; but it is said that without office the crown is possessed of a right of entry. Be that so; why may not the party demise subject to that right? That which a man has in himself, he may transfer to another. This right of entry in the crown only limits the *quantity* of estate which the party can pass. [*Taunton, J.* This is laid down from *Perkins* in *Comyns's Digest* (a). "So a person attainted of treason or felony has not capacity to make a grant that shall bind the king or the lord of whom the lands are held. But a grant by a person attainted binds himself and his heirs."] The position cited from *Perkins* is relied upon in *Sheppard's Touchstone*, in the passage already quoted (b). It is not disputed that the convict attaint is unable to bind the king by his grant. As against the lord also, it cannot be good, because his title by escheat is paramount the felon, and all claiming under him; but the lord's title by escheat does not accrue until after the crown has had the year, day, and waste. [*Parke, J.* This is not a case for year, day, and waste (c). The king would here be entitled to the profits during the life of the convict.] *Bullock v. Dodds* does not touch the present case. It is said that *H. Evans* is civiliter mortuus, and that therefore he was incapable of making a demise to the lessor of the plaintiff; but how does it appear that civil death incapacitates from demising? There is nothing to shew that it has that effect (d). In *Doe d. Evans v. Evans*, the question was not decided or even raised. To that case there is a note, which was inserted by a great authority, the late Mr. Justice *Holroyd*, which confirms this view of the question.

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waste.

Civil death.

III. The condition in this case is collateral to the land, and therefore an assignee of the reversion cannot take advantage of it. Either it is a condition personal to the lessee or it is not. If it be personal to the lessee, and requires that he shall be personally qualified to manage the farm, then it is collateral to the land. If it run with the

Third point.

(a) Capacity (D 6).

(b) *Ante*, 492.

(c) *Vide* 2 Inst. 37.

(d) See Co. Litt. 132 a.

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land, it is sufficient that the parties in possession are solvent and capable of managing the farm, and therefore there has been no breach of the condition.

It is sought to introduce words into the condition for the purpose of extending it; but the Court will not extend it in order to create a forfeiture. If the words "at any time or times" were introduced, there might perhaps be a continuing breach; but they are not there, and cannot be imported. As it stands, this cannot be a continuing breach. A man cannot continue to "become" insolvent.

An entry should be made *eo intuitu*. [*Parke, J. In Co. Litt. 245 b, (a)* a number of cases are collected *(b)*, the result of which is, that if a party do any thing on the land *as owner*, the entry is sufficient without words of claim.]

Judgment as  
to third point.

DENMAN, C. J.—Upon one of the many points raised, the Court think it necessary to give greater consideration. With regard to the forfeiture, I think, supposing it to be incurred at all, that it was waived by the acceptance of rent. The rent paid is stated to have been *the reserved rent*, which we must take to mean the rent reserved under the lease; and an acceptance of rent under the lease is an acknowledgment that at that time the lease was still in existence. Then it is said that the grantee of the reversion cannot take advantage of the forfeiture. It does not appear at what time the reversion was granted to him; but I think that a forfeiture incurred upon the conviction was waived by the subsequent acceptance of rent, and I do not think that this was a continuing breach. The question as to the entry is already decided. Then comes the question whether this party, who is civilly dead, or has forfeited all his rights, is capable of granting any thing to another, and thus able to make the demise upon which this ejectment is brought. This is a point upon which I do not think we have the authorities suffi-

(a) 3 Tho. Co. Litt. 57, 58.

(b) The authorities (*Panel v. Moor*, Plowd. 91, and cases from the Year Books) collected in the margin of the Commentary upon

Littleton, sect. 401, are vouched by Lord Coke with immediate reference to the interruption of the possession of *bastard eigne* by the entry of *mulier puiné*.

ciently before us to enable us to decide. We will take time to consider it.

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Second point

PARKE, J.—It appears to me that all the points in this case may be disposed of except the second. It has been very properly conceded, that the freehold would not be divested out of *Humphry Evans* without office found. Upon the second question I entertain a strong opinion in favour of the party's capacity for making a demise. But this may, perhaps, be altered upon referring to the authorities. We must inquire whether the issues and profits are in the Crown without office found.

The third objection is, that the lease was forfeited. This Third point.  
was a freehold lease, and capable of being forfeited only upon entry made upon the land. The lease was subject to this condition :—" In case the said *Evan Griffith*, his heirs and assigns, shall hereafter during the continuance of this lease happen to become insolvent and unable in circumstances to go on with the management of the said farm and demised premises," that then the demise " shall cease, determine, and be absolutely void." It appears to me, that if *Humphry Evans* ever did become insolvent at all by means of the conviction, he became so contemporaneously with the conviction, whether this forfeiture by conviction was ever perfected by entry, or whether it was waived. The case states a subsequent receipt of rent, with full knowledge of the facts. Where rent is taken as rent due under the lease by a landlord, with full knowledge of the facts which may have caused a previous forfeiture, this waives the forfeiture and affirms the lease. Therefore, I think this case disposed of, except as to the second question, upon which there is considerable doubt in the mind of the Court.

TAUNTON, J. concurred.

PATTERSON, J.—The Solicitor-General has contended Third point.  
that this is a continuing breach. My lord and brothers have shewn that they do not think that this is a continuing

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breach; and I am certainly myself of opinion that the forfeiture, if any, was upon the conviction, and that the subsequent payment of rent would be a waiver of it. *Dumpor's* case, I think, is distinguishable.

Upon the second question,

*Cur. adv. vult.*

Judgment  
upon the se-  
cond point.

DENMAN, C.J. now delivered the judgment of the Court.

The only point in this case upon which the Court took time to consider was, whether an action of ejectment can be maintained upon the demise of a person attainted of felony. It is admitted that an estate of freehold, which this was, is not divested in cases of attainder until office found; here no office has been found, and therefore the Crown is not entitled. It is laid down in "*Perkins's Profitable Book*," title Grants, s. 26, that "a man attainted of felony or murder, &c., may make a grant of a rent or common or a feoffment, &c., and the same shall bind all persons but the king (for his time), and the lord of whom the land is holden when his time shall come." This passage is referred to in Com. Dig. title Capacity (D. 6) (a). The same doctrine is laid down in *Sheppard's Touchstone*, 232 (b). The passage in *Co. Litt.* 42 b, which seems at first sight to be contrary, will, on examination, be found to be consistent with these authorities; for after stating that persons attainted of felony have no ability to enfeoff, &c., he concludes, "for the feoffments, &c. of these *may be avoided*," and doubtless they may, by the king (c). The case of *Bullock v. Dodds* (d) was pressed in argument. It is sufficient to say, as to that case, that it was an action for a chattel which had vested in the king without office found, and is therefore no authority upon this occasion. We are

(a) *Ante*, 501.

(b) See *Shepp. Touch.* 56.

(c) 2 Tho. Co. Litt. 219. In this passage, Lord Coke, in enumerating those who have no ability to enfeoff, makes no distinction between those persons whose acts are void,

and those whose acts are voidable only: thus *femes-covert*, whose feoffments are absolutely void, are classed with infants, lunatics, and men under duress, whose feoffments are good until avoided.

(d) 2 Barn. & Alders. 258.

therefore of opinion that *Humphry Evans* was capable of granting, and that judgment must be given for the plaintiff.

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Postea to the plaintiff (a).

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(a) And see Lord *Hungerford's* *well's* case, 2 Leon. 32, pl. 33; case, M. 4 E. 4, fo. 22; *Dowrie's* Anders. 188, 280; *Page's* case, 5 case, 3 Co. Rep. 10; Lord *Crom-* Co. Rep. 52.

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**The KING v. The Inhabitants of ST. GEORGE, HANOVER SQUARE.**

**UPON** an appeal against an order of two justices, whereby *Catherine Seaman* was removed from the parish of St. George, Hanover Square, to the parish of St. Peter, Paul's Wharf, the Court of Quarter Sessions quashed the order, subject to the opinion of the Court of King's Bench upon the following case:—

An organist appointed during the pleasure of the vestry, has not a public annual office conferring a settlement under 3 Will. 3, c. 11, s. 6.

The respondent parish is governed by a select vestry of one hundred and one persons. In 1827 a chapel was erected in North Audley Street, in this parish; and on the 21st of January, 1828, the vestry took into consideration what name should be given to the chapel, then nearly finished, and resolved that the same should be called St. Mark's Chapel, and that advertisements should be published that the vestry would meet on the 11th of February to appoint an organist for that chapel.

11th of February, 1828, an election took place at the board-room in Mount Street, on which occasion there were about forty candidates, and the election fell upon the pauper, as appears by the following minutes:—

"11th February, 1828. The vestry, pursuant to their resolution of January the 21st, proceeding to the election of an organist for St. Mark's Chapel, appoint Miss *Catherine Seaman* to that situation, to commence when the organ is in readiness for use, at a salary of 60*l.* per annum."

May 1828, the organ being completed, the pauper entered upon her duty, and continued to perform it, and to reside in



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the respondent parish, and receive her salary from the vestry through the vestry clerk, half yearly (with the exception of the first payment, which was 25*l.* only, from May to Michaelmas, 1828), until the 31st of March, 1832, when she was discharged by the vestry, as appears by the following entry upon their minutes :—

“ At a meeting of the vestry held on the 31st March, 1832, much discontent having been expressed by the pew-renters from time to time to the Rev. *Allen Cooper*, the minister of St. Mark's Chapel, of the total inefficiency of the present organist :—Resolved, that she be removed, and that the Rev. Mr. *Cooper* be requested to recommend a competent person to succeed her, upon the same salary as is now enjoyed by her ; it being understood that the person to be appointed shall continue to pay her salary up to Midsummer next.”

The question for the opinion of the Court is, whether the pauper gained a settlement in St. George, Hanover Square, by serving the office of organist.

*Adolphus* and *Payne* in support of the order of sessions. This question depends upon the effect of the statute of 3 and 4 *W. & M.* 3, c. 11. The third section of 1 *Jac.* 2, c. 11, after reciting, that forasmuch as poor persons at their first coming to a parish do commonly conceal themselves, enacts, “ that the forty days' continuance of such person in a parish intended by the said act to make a settlement, should be accounted from the time of a delivery of notice in writing of the house of his or her abode, and the number of his or her family, if he or she have any, to one of the churchwardens or overseers of the poor of the said parish to which they shall so remove.” Then the 3 & 4 *W. & M.* c. 11, was passed ; the sixth section of which enacts, “ that if any person who shall come to inhabit in any town or parish, shall for himself or on his own account execute any *public annual office* or charge in the said town or parish during one whole year, then he shall be adjudged and deemed to have a legal settlement in the same, though no such notice in

writing be delivered and published, as is hereby before required." As early as the reign of *George the First*, it was said, that the office need not be *parochial*, provided it be a *public* office. It need not be a parish office, but an office in the parish, as notoriety is to the residence of persons coming to inhabit, was the object the statute wished to attain. Accordingly, it has been held, that a parish clerk, an ale-taster of a borough, and the hog-ringer for the parish, may gain a settlement by performing the duties of their respective offices. In *Rex v. Mersham* (a) it was held, that the master of a workhouse did not gain a settlement by fulfilling the duties of his appointment. But the circumstances of this case differ from those of *Rex v. Mersham*. The organist in this case could not have been dismissed without the assent of the parishioners in vestry assembled, and she was actually turned away by a vote of the vestry. The master of the workhouse might be dismissed at any time by the overseers. This employment is as much an office as the appointment of a parish clerk. By the rubric certain parts of the service are to be said or sung, and when the parishioners have erected an organ, the playing on the organ is part of the service. The notoriety of his employment is the reason that the parish clerk acquires a settlement, and there is much notoriety in this case.

Sir *J. Scarlett*, and *Bodkin*, *contra*, were stopped by the Court.

DENMAN, C. J.—It is quite clear that notoriety is the principle, but then it is notoriety to be established by serving a public annual office. There is a difference between an employment created by a party and by law. The keeper of a workhouse is the holder of an employment created by the act of a party. If the argument urged to day were adopted, every person who holds an employment which was publicly known in the parish would gain a settlement there.

(a) 7 East, 167; S. C. 3 Smith's Reports, 151.

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PARKE, J.—It appears clearly that the pauper was removable at the will of the parish. I am at a loss to see where we are to stop, if we hold this to be an office which confers a settlement. The argument would apply to bassoon-players in a country church paid by the parish, and to pew-openers and others(a).

TAUNTON, J.—It was altogether matter of private arrangement and private taste. As to the notoriety of the employment, it does not follow that every one who hears the organ knows who plays upon it.

PATTESON, J. concurred.

Order of Sessions quashed (b).

(a) And see *Ilk's case*, 1 Vent.  
143, 153.

(b) Vide *Rex v. Lea*, 3 Mann. &  
Ryl. 369; 8 Barn. & Cressw. 655.

DOE, on the several demises of JOSEPH READ and JAMES  
READ, v. SOPHIA TAYLOR.

Livery of seisin is not invalidated by omitting to remove from the house or land a child found there, unless that child be part of the family of a person having an immediate estate or interest in the premises, placed there for the purpose of continuing the possession of such person.

**EJECTMENT** for a dwelling-house and ten acres of land, in the parish of Berkeley, in the county of Gloucester. At the trial before *Littledale, J.*, at the Gloucester Spring assizes, 1892, the following facts appeared:—

About fifty years ago, *James Taylor* was seised of the entirety of the premises in question, and died intestate in 1815, leaving five daughters, *Betty, Mary, Sarah, Nancy*, and the defendant *Sophia*, his co-heirs. *Nancy* married *Joseph Read*, one of the lessors of the plaintiff, who now claims as tenant by the curtesy, and had issue, *James Read*, the other lessor of the plaintiff.

A feoffment by one parcener, who occupies alone under a general entry, operates as a conveyance of her own purparty, and as a *deforcement* of her coparceners.

1822.—The defendant was left in the occupation of the property, and continued in such occupation until the time of the trial of this cause.

Hilary Term, 1822.—The defendant levied a fine, with proclamations, to *James Player*.

22d May, 1832.—The defendant made a feoffment, with livery of seisin. The livery was given, as to the land, by cutting a sod and delivering it to the feoffee, and as to the house, by delivery of the hasp of the door. Previously to the performance of this ceremony, all persons were put out of the house and land except a little boy, who remained in the house.

On the part of the defendant it was contended that this fine and feoffment with livery, operated as an ouster and disseisin(a) of the other coparceners. On the part of the plaintiff it was contended, that from the circumstance of the child's being in the house at the time, the livery of seisin was void, and that the plaintiff was entitled to a verdict on the authority of Blackstone's Commentaries(b), where the manner of delivering seisin is thus described:—"The feoffor, if it be land, doth deliver to the feoffee, *all other persons being out of the ground*, a clod or turf, or twig or bough &c. But if it be a house, the feoffor must take the ring or latch of the door, *the house being quite empty*," &c.

By the direction of the learned judge a verdict was found for the plaintiff; but leave was given to the defendant to move to enter a verdict for herself, or for a new trial. In Easter term, 1832, *Campbell* obtained a rule nisi accordingly; against which

(a) "If one parcener enter (generally) and make a feoffment, this divests the party of her sister; for the subsequent act explains the preceding entry, and shews that she was seised of the whole; yet it is not properly a *disseisin*, because the other never was seised, nor an *abatement*, because both make but one heir:" Co. Litt. 374, a. But in

Co. Litt. 243 b, it is said that "if she specially enter claiming the whole land and take the whole profits, she gains her sister's moiety by *abatement*;" *ideo quære*. And see *Davenport v. Tyrrell*, 1 W. Bla. 675; *Coppinger v. Keating*, cited in *Peaceable v. Hornblower*, 1 East, 568.

(b) 2 vol. 315.

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First point:  
Void livery of  
seisin.

Induction.

Second point:  
Incompetent  
feoffor.

*Ludlow, Serjt. and Talfourd, shewed cause.* The livery of seisin in this case was inoperative. In order to make the livery effectual, every individual competent to maintain the possession, should be removed from the premises: 2 *Bla. Com.* 315; *Co. Lit.* 48 (a), and *West's Symboleography* (b), there quoted; *Perkins, Feoffment*, 209; *Sheppard's Touchstone*, cap. 9, 213; *Fitzh. Abridg. Assize*, pl. 418 (c). [*Patteson, J.* In that case the person left upon the land was the boy (d) of the lessee.] There are cases of feoffments, in which the question has been whether there was such a continuance of occupation by the lessee as would avoid the livery; and it was said that having cattle or furniture on the premises would not make the livery ineffectual, but that leaving a boy (un garson) of the lessee in the house would do so. In *Bettisworth's* case (e), lessor made a feoffment of a house and lands, and gave livery on the land, lessee remaining in the house; and it was held that the livery was not good. In the common case of induction to a living, the church is made empty, the door locked, and the clergyman enters by himself and rings the bell, the others being out. This boy's remaining in the house is a sufficient continuance of the possession to make the livery void. If the defendant had been a lessee of a third person, who made a feoffment pending her interest, it is quite clear from the authorities that this boy's presence in the house whilst livery was being given, would have preserved her interest. Now, if the boy could have maintained the possession in case a third person had made a feoffment against the interest of the defendant as lessee in possession, he was capable of maintaining, as against the defendant, the possession of her coparcener, the lessor of the plaintiff in the present case.

This feoffment is not only informal, but also substan-

(a) 2 *Tho. Co. Litt.* 334.

(b) *Lib.* 2, part 1, 251.

(c) Before *Spigurnel, J.*, at London, anno 8 *Edw.* (I).

(d) Un garson (*garcio*).

As to the class of villeins called

*garciones*, and the *therage* paid by them to their lords, *vide* 3 *Mann. & Ryl.* 151, note (b), and see *ibid.* 152, 154, 288, 347, 468 to 474, in *Rowe v. Brenton*.

(e) 2 *Co. Rep.* 51.

tially bad. Three things are necessary in order to make a feoffment good and effectual; that the parties having the lawful possession should be present to make the feoffment, that all persons be removed from the premises, and that the feoffee be there. In this case the parties having the lawful possession were not present. The possession was in the five sisters and not in the defendant alone. The possession of one coparcener is in law the possession of all; and unless the defendant made an actual ouster of the other coparceners, she could not have the sole possession in law: *Co. Lit.* 373 *b* (a). Here, the original entry of the defendant was general, and did not amount to an ouster of her coparceners, and she has since done no act which would constitute a disseisin. If the defendant had entered upon a void possession at the period of making the feoffment, her entry would have related back to the period at which she first began to occupy for her sole benefit, and thus would have made her original entry tortious and a disseisin of her coparceners: *Com. Dig.* *Parcener* (A. 3); *Co. Lit.* 374 *a*. At the moment of making the feoffment by the defendant, she and her four sisters, or their representatives, were the lawful possessors, and she was only bailiff of the others as far as regarded their purparties. Of her own purparty she was in possession; and this passed by the feoffment, supposing it not bad in point of form. The four sisters were, in contemplation of law, in the house at the time of the feoffment and livery, and they did not join in the feoffment, which consequently is in substance bad.

*Campbell, S. G. and J. Evans*, in support of the rule. The only point raised at the trial was that respecting the regularity of the livery. It is not necessary, in order to make an effective livery of seisin, that every individual should be removed from the land. The passage cited from *Blackstone's Commentaries* is one of the few mistakes

(a) 1 *Tho. Co. Lit.* 284. *Sed vide ante*, 109 (a).

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found in that excellent work. *Co. Litt.* 48 *b*, which is referred to, does not support the position, as it is there said, that livery of seisin may be given of a house, "the feoffor being at the house-door, or *within* the house." The circumstance of the feoffor's being in the house is therefore immaterial, and consequently it should be considered that the presence of the child, who was under the nurture of the feoffor, can be of no avail. It may be the ordinary, but is not the only mode, to remove all persons before delivery of possession. The passage in *Sheppard's Touchstone*, 213, which is relied on, commences thus: "The *most usual*, formal and orderly manner of making of livery," &c., from which it plainly appears not to be the *sole* manner. The presence of a lessee for years, or that of any other person having an *estate* in the land, may vitiate the livery; but the presence of a stranger is altogether immaterial. From the passage in *Blackstone's Commentaries*, viewed in conjunction with the authorities, it appears that it is only necessary that all persons having any *interest* should be off the land. It is admitted that a fine levied by one coparcener will not operate as a bar to another coparcener, unless there have been a previous ouster: *Peaceable d. Hornblower v. Read*(*a*). But where there has been a feoffment previously to the levying of the fine, it is otherwise: *Earl of Pomfret v. Lord Windsor*(*b*). In this case the fine was preceded by a feoffment. The feoffment was not, as it is urged, invalid. The acts of the defendant amounted to an ouster of the other parceners, and she thereby acquired a tortious fee in the entirety which passed by the feoffment. The fine with proclamations after the expiration of five years without claim, converted the tortious fee into a perfect fee. It is said in *Perkins*, pl. 220, p. 98, "If two joint-tenants are in fee, and one of them doth enfeoff a stranger of the whole, against the will of his companion, *his companion being upon the land*, by this feoffment the moiety passeth, causa patet." From this it may be inferred, that if the dissenting joint-

(*a*) 1 East, 568.

(*b*) 2 Vez. sen. 481; 2 Sanders, on Uses, 9.

tenant had not been upon the land, the entire estate would have passed by the feoffment. Now if this be so with joint-tenants *& fortiori* it must be the case with coparceners. *Townsend* and *Pastor's* case (a) shews that in the case of coparceners, the feoffment in fee by one may enure as to the whole, partly by rightful conveyance, and partly by way of disseisin. This case was argued in Hilary term 1833 (b).

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*Cur. adv. vult.*

LITTLEDALE, J. in this term delivered the judgment of the Court. After having stated the facts of the case, the learned judge thus proceeded. It did not appear in evidence that this child was in any way related to any of the co-heiresses, but from the turn of the argument in this Court, there seemed reason to suppose that he was a descendant of one of the coparceners. On shewing cause against the rule, it was admitted that a fine alone would not have the effect of creating an ouster and disseisin; *Peaceable v. Reid* (c). Besides the authority from *Blackstone* (d), the plaintiff relied on *Perkins* (e), where it is said that to deliver seisin, the manner is to remove all persons off the land; and *Sheppard's Touchstone* (f), where, after describing the reading of the deed of feoffment, &c., it is said, "the feoffor, if it be a house, do take the ring, latch, or hasp of the door, (*all* the people, men, women and children, being out of the house); or if it be a piece of ground, do take a clod of the ground, or a bough or twig of a tree, or bush growing thereupon; and (*all* the people being out of the ground,) the same ring, &c., clod, or bush, &c., with the deed, do deliver to the feoffee, &c., and in the delivery of seisin do use plain words."

In *Fitzherbert's Abridgement*, tit. *Assize*, 418, one S. was seised in fee of a messuage, and made a lease for years to

(a) 4 Leonard, 52.

(b) *Denman*, C. J. was absent at the time of the argument by reason of a domestic affliction.

(c) 1 East, 562.

(d) 2 Bla. Comm. 315.

(e) Pl. 209.

(f) 214.



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*M.*, and afterwards gave the same messuage to one *K.* in tail, and delivered seisin to him, *M.* being out of the house at the time of the livery of seisin; but it appeared that *M.* had a *garson* within, when seisin was delivered, and therefore the livery of seisin was held to be void. This case is cited in *Bro. Abr.*, *Feoffment de terres*, pl. 80, that "a man may make livery of seisin of the land of the termor in his absence, notwithstanding the termor has chattels on the land; but otherwise if he has a *garson* on the land." In *Dyer*, 18 b, a man seised of a messuage, and of a close adjoining, made a lease of the messuage for a term of years, or for life, and afterwards made a feoffment of the messuage and close, and delivered seisin in the messuage (the termor being at market, and his wife and children in the house) in the name of all; and the question was, whether the house passed, and it seems not, inasmuch as the continuance of the wife and children of the lessee saved his right and possession.

In these cases from *Fitzherbert*, *Brooke*, and *Dyer*, there was somebody remaining in the house who was of the family of the termor, who was in the actual possession of the property, and whose right was sought to be taken away by the feoffment and livery in his absence; and that falls within the principle of what is said in *Shepp. Touchstone*, 213, that in the making of every livery of seisin, it is requisite that *all persons who have any lawful estate and possession in the thing whereof livery is to be made, as lessees for life or years, and such like, join in the making thereof, or be removed thence; for every livery ought to bring an immediate possession to the feoffee, donee, &c.*

With regard to the livery in question, if the child was a part of the family of one of the coparceners intended to be ousted, and was placed in the house to represent such coparcener, then we think he ought to have been put out of the house before the livery. But unless he had been placed to represent one of such coparceners, we think that the child, being suffered to remain in the house, would not make the livery invalid, even if he had been a descendant

of one of the coparceners, if he was a mere inmate of the family of the defendant.

Another objection was made to the feoffment, that though if the defendant had entered upon the land on a vacant possession, and taken the whole profits adversely, and had then made the feoffment, that would have been a disseisin, here she was not in lawful possession of the whole, but was, as to part, bailiff and servant to the other coparceners, who, in contemplation of law, must be taken to be in possession, and that therefore the defendant could not by any feoffment deprive them of this right. But we are of opinion that does not constitute an objection.

In *Perkins*, pl. 220 (a), it is said, that "if two joint tenants are in fee, and one of them doth enfeoff a stranger of the whole against the will of his companion, being upon the land, by this feoffment but a moiety passeth, causa patet;" but that seems to imply, that if he was off the land the feoffment would bind him. And the same rule is stated in *Shepp. Touchstone*, 208. "If one joint-tenant make a feoffment of the whole land, *his companion being then upon the land*, by this there doth pass no more but a moiety, and the feoffment is void as to the moiety of his companion, for the feoffment doth not give his moiety." The reason seems to be, that as to the other moiety he has not the possession, and therefore as to that moiety delivery is void. But we think that if the other joint tenant *be not upon the land*, the feoffment will amount to a disseisin. What is before stated is as to joint-tenants, but the same principle seems to apply to coparceners. In *Townsend and Pastor's* case (b), it was holden in the Common Pleas by all the justices, that where two coparceners are, in the use of a manor: after the statute 1 *Rick*. 3 (c), the one of them enters and makes a feoffment in fee of the whole manor, this feoffment is not only of the moiety of the manor whereof she might lawfully by the said statute make a feoffment, but also of another moiety by disseisin (d).

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(a) Page 98.

(b) 4 Leon. 52.

(c) Cap. 1.

(d) *Vide ante*, 509 (a).

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In *Gerry v. Stelford* (a), an ejectione firmæ was brought and a special verdict found, that there were two coparceners of a house; the one entered generally, and made a lease for life by the name of "all that his house &c.;" the question was, whether all the moiety only of the house passed. *Popham* and *Fenner* held that the entire house passed; for when he saith, "*all that my house &c.*," that intendeth the whole house, and by his livery made he gained the entire, and gave the entire; although by his general entry, it is not intended that he entered into more than to what he had a right. *Gawdy* é contrà. For as his entry primâ facie doth not gain more than he had a right to demand, no more shall this lease. *Foster*, at the bar, cited that it was adjudged in this Court, in *Reignold's* case, according to the opinion of *Popham*. In these two last cases the coparcener is stated to have entered; and the general rule is, that where several persons have a right, and one of them enters generally, it shall be an entry for all; for entry generally shall always be taken according to right. Several cases to this effect will be found in *Viner's Abridgment* (b), title *Entry*, F., where several authorities in 1 *Rolle's Abridgment*, 740, are incorporated. But notwithstanding this general rule, the other coparcener was, in both the above-mentioned cases, taken to be ousted. In the present case there is no evidence in what way the defendant entered into the premises, —whether it was a general entry, or a special one for herself and the other coparceners, or for herself alone. In the absence of proof, it must be intended to be a general entry.

Upon the whole of this case, we are of opinion that a verdict should be entered for the defendant.

Rule absolute to enter a verdict for the defendant (c).

(a) Cro. Eliz. 616.

(b) 9 Vin. Abr. 457.

(c) And see *Hempsey v. Brice*, 1 Roll. Abr. 658, pl. 2, (translated in 9 Vin. Abr. 84, 85), Sir F. Moore, 546, pl. 729, and Cro. Eliz.

639; *Smales v. Dale*, Hobart, 120; *Reading v. Ramsterne*, 2 Ld Raym. 829, and 1 Salk. 242; Doe dem. *Fisher v. Prosser*, Cowper, 217; Doe dem. *Were v. Cole*, 1 Mann. & Ryl. 33; 7 Barn. & Cressw. 243.

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## PLANT v. JAMES and MARTIN.

**TRESPASS** for breaking and entering the plaintiff's closes. Plea: *actio non*, because the closes in the declaration mentioned were part of a certain farm called Woods Eaves House Farm, and before and at the time of the making the indenture thereafter next mentioned, *Thomas Smallwood* and *Maria* his wife in her right, and *Elizabeth Hector*, were seised respectively of undivided moieties of and in the said farm, and also of and in certain messuages, tenements and hereditaments, called respectively Park Hall and Park House; and being so seised on 10th November, 1812, by indenture of release (to which *Thomas Huxley* and *Richard Spearman* were parties), for the making a partition and division of the several messuages &c., and for conveying and assuring the said messuages &c. to the several uses, upon the trusts, and to and for the several intents and purposes, and in the manner thereafter limited and declared, *Smallwood* and wife, and *Elizabeth Hector*, according to their aforesaid estates and interests in the said hereditaments, conveyed to *Huxley* Park Hall and Park House, to which they were entitled by descent as coparceners, and Woods Eaves, to which they were entitled under a settlement in tail general, and also an allotment under an inclosure act, in respect of certain of the premises, together with "all houses, outhouses, edifices, &c. ways, paths, passages, &c. easements, profits, &c. rights, members and appurtenances whatsoever, to the said several messuages or tenements, lands and hereditaments, lying, belonging, or in anywise appertaining, or *therewith usually held, used, occupied,* legally extinguished, (as where there has been unity of possession,) but subsisting *de facto*, the grantor should use express words of creation, or introduce the terms "therewith used and enjoyed."

The word "appurtenances" in a declaration of uses, is not to be construed in its strict technical sense, where in creating the seisin to serve such uses, the more general words "ways used, occupied or enjoyed therewith," occur in the same deed.

A grant of Whiteacre and Blackacre, "with all ways used, occupied or enjoyed therewith," extends to ways used &c. over *other* lands of the grantor, but does not convey to the grantee a right to ways used to and from one of those parcels over the other of them:

*A. and B., coparceners, convey to C. Whiteacre and Blackacre, together with all ways therewith usually held, used, occupied or enjoyed; as to Whiteacre, and the appurtenances to the use of A. and his heirs, and as to Blackacre and the appurtenances, to the use of B. and his heirs. A way used before the partition from Whiteacre over Blackacre, does not vest in A. under this deed.*

Under the word "appurtenances," an easement which has become extinct, (as by unity of possession,) or which has no legal existence, though enjoyed *de facto*, does not pass.

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or enjoyed, or accepted, reputed, deemed, taken or known as part, parcel or member thereof." To hold Park Hall and Park House to *Huxley* and his heirs, to the uses thereinafter expressed, and to hold Woods Eaves Farm and the allotment to *Huxley* and his heirs, to the use of *Huxley* and his heirs, to make him tenant to the præcipe, in order to suffer the common recovery thereof. The indenture also contained a covenant by *Smallwood* with *Spearman*, to levy a fine of their moiety in Park Hall and Park House, and a declaration that a recovery should be suffered of the Woods Eaves estates. The deed then declares the uses of the fine, recovery and conveyance, to be: as for and concerning *Park Hall and Park House*, with the buildings, lands, hereditaments and appurtenances thereunto respectively belonging, and also the said allotment of common with its appurtenances, to the use of such person or persons, and for such estate or estates &c. as *Smallwood* at any time by deed should appoint; and in default of such appointment and subject thereto, to *Smallwood* for life; with further limitations over: and as for and concerning Woods Eaves House Farm, with the buildings, lands, hereditaments and appurtenances thereto belonging, to the only proper use of *Elizabeth Hector*, her heirs and assigns for ever. The plea then stated the levying of the fine and the suffering of the recovery, and that long before and at the time of the making of the said indenture, and levying the fine and suffering the recovery, the occupiers for the time being of Park Hall had always been used to have and enjoy a certain way from a certain public king's highway, into, through, over, and along the said closes, in which &c., towards and unto Park Hall aforesaid, and so back again &c., at their free will and pleasure, for the convenient use and occupation of Park Hall aforesaid, and that the said way had before, and at the time of making the said indenture, and levying the fine and suffering the recovery, been always held, used, occupied and enjoyed therewith. The plea then deduced the title to Park Hall and the various appur-

tenances, including the right of way, (if it passed by this indenture from *Smallwood* to the defendant *James*), and justified the trespasses mentioned in the declaration by *James*, in his own right, as owner and occupier of *Park Hall*, and by the defendant *Martin*, as his tenant, by reason of the right of way.

General demurrer and joinder (*a*).

*R. W. Richards*, for the plaintiff. The words of conveyance to the trustee, viz., ways, paths, &c., usually held, &c., are undoubtedly such as are ordinarily used to convey a right of way which has not existed long enough to amount to an easement *when over other property*. In that part of the deed which declares the uses, which is the material part, the language is different. The word *appurtenances* only is there used, and it is clear that as there was, at the time of making the indenture, a unity of the possession of the now separate estates, the grant of one portion, *with the appurtenances*, will not operate to create an easement over the other, although the parties who occupied the lands during the unity of the possession, have always used the way therewith; *Clements v. Lambert* (*b*). [*Parke, J.* The word *appurtenances* means *primâ facie* an easement or incorporeal hereditament in *alieno solo*.] The Court will, in construing the deed, look at the intention of the parties. In this case no presumption can arise against any one party in favour of another, for all are equally conveying parties. The nature of the transaction appears to shew that it cannot have been the intention of the parties to give a right of way to one over the land of the other, the object of the deed being to make their respective shares entirely separate and distinct.

*Follett*, contra.—This way would pass by the deed. The

(*a*) The ground of demurrer was as the defendants claimed is stated in the margin of the demurrer books, delivered by the plaintiff, was, that no such right of way as the defendants claimed is reserved by the deed of partition set forth in the plea, *1 Taunt. 205*.

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point, indeed, seems to have been conceded; for it has been admitted that where a way has been used, and there is a grant of lands *with all ways therewith usually used*, the way will pass. The estate which is intended to be dealt with is described in the conveyance to the trustees; and the words which are used in the subsequent parts of the deed are intended to be by way of reference. It is impossible in this case for the right of way which is conveyed to the relessee to uses, to remain in him. The statute of uses would take it out of him. In construing a deed which operates under that statute, general words in the part which declares the uses will be taken, if possible, to include all that is granted to the feoffee or relessee to uses. Here, "appurtenances" in the part which declares the uses, must be taken to include all the easements which passed to the relessee by the general words "ways usually held, used, occupied, and enjoyed with the estate." *Kooystra v. Lucas* (a) is precisely similar as to these words. In that case there was a demise by lease, to take effect at a future time, of a part of a yard, "together with all ways to the demised premises belonging to or with any part thereof used and enjoyed;" and it appearing that at the time of the grant the whole yard was occupied by one tenant of the grantor, who used a gateway to all parts of the yard, the Court held that the words used in the demise operated to give to the grantee a right of way through the gateway to the portion of the yard demised to him; *Morris v. Edgington* (b). In *Whalley v. Thompson* (c), where the question was, whether a right to a way which had always been used over close A. to close B. passed under a devise of A., "with the appurtenances" from a person who was seised in fee of both closes. *Eyre, C. J.* held, that the word "appurtenances" did not carry any but an old existing right; but said, "had the devise been 'with the way now used,' it would certainly have

(a) 5 Barn. & Alders. 830; 1  
Dowl. & Ryl. 506.

(b) 3 Taunt. 24.  
(c) 1 Bos. & Pull. 371.

been a devise of the close A., with an easement newly created." In *Harding v. Wilson* (a) a similar point arose; and *Holroyd, J.* took the distinction between "all ways thereunto appertaining," and all ways "heretofore used." [*Parke, J.* There is no doubt of that. The question is, whether by the word "appurtenances," it was intended to convey all that is mentioned in the former part of the deed. *Patteson, J.* That which Lord Chief Justice *Mansfield* says, in *Morris v. Edgington*, is very strong to shew that this way would pass.] This argument shews that it is not an inflexible rule that the word "appurtenances" will not carry a right of way over the land of the grantor. Here, however, the Court will find that the part of the deed which declares the uses, refers distinctly to the premises before mentioned, to which of course it alone could refer. The words "*the said messuages or tenements*," might comprise the right of way which had been granted to the relessee.

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*R. V. Richards*, in reply. The road claimed is over part of the very soil conveyed; and the words "therewith used," cannot be intended to convey roads over that soil. The word "appurtenances" in the declaration of uses cannot carry such a way.

*Cur. adv. vult.*

*DENMAN, C. J.* in the same term delivered the judgment of the Court. After stating the pleadings, the Lord Chief Justice proceeded as follows:—The sole question is, whether this right of way passed by the indenture, fine, and recovery. We are of opinion that it did not, as there are no words in this indenture capable by law of passing such an easement. Whether the parties intended to include this way, is a mere matter of conjecture; but the question in this and all similar cases is, not what the parties intended to do, but what is the meaning of the words they have used.

(a) 3 Dowl. & Ryl. 287; 2 Barn. & Cressw. 96.



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Nothing is more clear, than that under the word "appurtenances," according to its legal sense, an easement which has become extinct, or which does not exist in point of law, by reason of unity of ownership, does not pass; *Grymes v. Peacock* (a), *Saundey v. Oliff* (b), *Whalley v. Thompson* (c), *Clements v. Lambert* (d), and *Barlow v. Rhodes* (e). If the grantor wish to revive, or create such a right, he must do it by express words, or introduce the terms "therewith used and enjoyed," in which case easements existing in point of fact, though not existing in point of law, would vest in the grantees. It is, however, insisted, that the meaning of the word "appurtenances" may be extended, either by reference to the actual state of the subject of the grant, or to the context: and the case of *Morris v. Edgington* (f), is referred to in support of the former position. That was, as is observed by Mr. Baron Bayley (g), not a case properly requiring the construction of the words "belonging and appertaining," because if there had been no such words, the law would have implied the way in question as a way of necessity, and all that the Court determined was, that one way being necessary, and there being two, the more convenient way to the lessee passed. Some expressions are attributed to Lord Chief Justice Mansfield in the report, which can hardly be correct. He is stated to have said, that "as we hear of no other ways, and as it is impossible that these parties, who are supposed necessarily to understand the law, could suppose these ways were 'ways appurtenant,' they therefore meant them, being the only subsisting ways, by the improper name of 'ways appurtenant.'" It would have been more correct to have stated, that one of the ways would have passed as a way of necessity, and not to have made use of the absence of other ways as a ground for extending the meaning of the term

(a) 1 Bulst. 17.

(b) Sir Fra. Moore, 467.

(c) 1 B. &amp; P. 371.

(d) 1 Taunt. 205.

(e) 1 Crompton &amp; Meeeson, 439.

(f) 3 Taunt. 24.

(g) 1 Crompton &amp; Meeeson, 449.

"appurtenant;" and, indeed, it would be dangerous to press the general words of a conveyance into a proof that the parties must have meant something to pass under each; for such words are generally inserted to cover any right which may possibly exist; and there are scarcely any conveyances in which all such words are satisfied. But supposing the observations of the lord chief justice to be well founded, they are inapplicable to the present case, as there is no grant here of "ways appurtenant;" and if there had been, it does not appear upon these pleadings, but that there were ways strictly appurtenant to satisfy the grant.

The principal reliance on the part of the defendant is, however, placed on the other ground, viz., that the context shews that the word "appurtenances" is not to be construed in its strict technical sense; and that it was meant to comprise all the easements relating to Park Hall estate, which passed to the relessee to uses under the general words of "ways used, occupied, and enjoyed" with that estate; for it was contended, that it never could have been in the contemplation of the parties, that any easements should be conveyed to the relessee, which were not to pass from him to the cestui que use. The correctness of that reasoning may be admitted; but the difficulty in the way of the defendant is, that this right of way in the Woods Eaves estate, to the Park Hall estate, did not, and could not, pass by these general words; for the soil itself of both estates passed; and in that part of the conveyance, the general words of "all ways used, occupied, and enjoyed with the lands," could convey only ways, if any such happened to be, in other lands of the releasors not granted to the relessee. They could not have any operation to create a right of way *de novo*, in the very lands, the freehold of which was granted by the same sentence in the deed.

It may be further observed, that no definite line of road is so marked out in the deed, or ascertainable by reference to any other instrument mentioned in it, as to shew that the parties contemplated its existence before the partition or its

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continuance afterwards. Even the words "therewith used," cannot, without some violence, be applied to the Park Hall Farm, and the Woods Eaves Farm separately considered, as they follow the mention of both farms, and may mean such ways as had been used by the joint owner of both in respect of his joint ownership. There is no clear statement, therefore, that the way claimed was ever *de facto* used, except as every owner has a right of going over every part of his own land : and even if the word "appurtenances" were susceptible of the sense contended for in this case, the intention so to apply it is far from being established.

For these reasons, we are of opinion that the way in question did not pass by the indenture, fine, and recovery, and that the plaintiff is entitled to our judgment. It may be, that these instruments have not carried into effect the intention of the parties, and that there has been a mistake in the words used. But if this be so, the parties must take the consequence of their neglect ; it would be dangerous to unsettle the meaning of legal terms, in order to obviate a particular mischief.

Judgment for the plaintiff.

DOE dem. PILKINGTON v. SPRATT.

Under a devise to A. for life, remainder to the right heir male of the testator, in fee, the remainder vests upon the death of the testator in the person then answering the description of heir male.

EJECTMENT for a copyhold messuage and lands, parcel of the manor of East and West Deeping, in the county of Lincoln. At the trial before *Denman*, C. J. at the Lincoln Spring assizes, 1833, a verdict was taken for the plaintiff by consent, subject to the opinion of the Court of King's Bench upon the following case :—

10th March, 1801, *William Spratt* devised as follows :—
 " I give and devise all that my cottage or tenement, and half an acre of land, situate &c. (being the premises in question,) together held by copies of court roll of the said manor under the yearly rent of 9s. 6d., with the appurtenances

thereunto belonging, unto my son *Daniel Spratt* and *Sarah* his wife, and *James Hankin* and *Elizabeth* his wife, or the survivor of them, during their natural lives, and no longer; and after the decease of all of them, to the male heir (a) at law of me the said *William Spratt*, his heirs and assigns for ever. I give and bequeath unto my sons *Charles*, *Urias*, and *James*, 7s. each, to be paid within one month after my decease." The words "of the said *William Spratt*, his heirs and assigns for ever," were interlined, and directed to be taken as part of the above will, and the testator then republished the same. According to the custom of the manor, copyholds may be granted in tail (b).

10th October, 1801, the testator died, leaving six sons and one daughter, *William* (the eldest), *Charles*, and *Elizabeth*, by his first wife; *Daniel* (the eldest child by his second marriage), *Urias*, and *James*, by his second wife.

28th April, 1802, *Daniel Spratt*, and *Sarah* his wife, and *Elizabeth Hankin*, widow of *James Hankin*, the then surviving devisees for life, were duly admitted to hold to them and the survivor of them during their natural lives.

1st October, 1806, *William Spratt*, the eldest son and

(a) Where the heir male is to take by purchase, it is necessary that the taker fill the double character of heir general and heir male; Co. Litt. 24 b, 26 b, 164 a. But where "heirs male" are used as words of limitation, the estate will descend to the party who is heir male, although not heir general. To give effect to such a limitation in a deed, it must appear from what person the line of heirs is to spring, otherwise the grantee will take in fee simple; Litt. sect. 31, Co. Litt. 26 a. But a grant of armorial bearings to a man and his heirs male, will pass to the collateral heirs male of the grantee; Co. Litt. 26 a. So where by letters patent the dignity of an earl was

limited to the patentee and his heirs male, it was decided by the House of Lords in the case of the earldom of Devon, that the collateral heir male of the patentee (who was not his heir general) was capable of taking the dignity by descent under this limitation.

(b) It may be inferred from the case, that *W. S.* was a copyholder in fee. Where the lord can, by the custom, make grants in fee, no custom is necessary to enable him to grant in tail; Co. Litt. 52 b. Supposing, however, a special custom to be necessary to enable the lord to grant in fee, it does not necessarily follow that such a custom would warrant the creation of an estate tail by the copyholder.

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heir of the testator, was admitted to the said reversion (remainder) expectant on the death of *Daniel Spratt* and *Sarah* his wife, the then surviving devisees for life.

20th November, 1806, *William Spratt*, the son, and the devisees for life, surrendered absolutely, to the use of *Benjamin Handley*, certain common rights appurtenant to the devised premises. *Handley* was admitted to such common rights upon that surrender. Upon an inclosure which afterwards took place, allotments were made to *Handley* in respect thereof, of which he is still possessed.

1811, *William Spratt*, the son, died without issue, and intestate.

17th January, 1821, *Charles Spratt*, brother and heir of *William Spratt*, was admitted to the reversion (remainder) expectant on the death of the tenants for life.

14th November, 1821, *Charles Spratt* joined the tenants for life in a conditional surrender, in open Court, to the lessor of the plaintiff, his heirs and assigns, for 80l., with a proviso for redemption by *Charles Spratt* or the tenants for life, or either of them, their heirs, executors, &c., whereupon the lessor of the plaintiff was duly admitted, according to the effect of such surrender.

1831, *Charles Spratt* died in the lifetime of *Daniel Spratt*, the last surviving devisee for life, leaving *William Spratt*, the defendant, his eldest son.

1831, *Daniel Spratt* died, and *William Spratt*, the defendant (the son of *Charles*), was admitted.

By the custom of the manor, a surrender absolute operates to bar an entail.

The question for the opinion of the Court is, whether the remainder over after the death of the devisees for life, vested upon the death of the testator in his son, who was then his male heir at law, or whether it vested upon the determination of the life estates in the defendant, who was, upon such determination, the male heir at law of the testator. In the former case, the verdict is to stand; in the latter, a verdict is to be entered for the defendant.

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N. R. Clarke for the plaintiff. The remainder vested in the testator's son, who was his heir at law at the time of his death. The general rule of law favours the vesting of remainders. The Court will not construe the devise to be to the person who should happen to be the heir at law of the testator at the time of the determination of the life estates, unless that appears beyond doubt to have been the intention of the testator; *Holloway v. Holloway* (a). There the testator, by a codicil, gave a sum of money in trust for his daughter, Mrs. *Hindes*, for life, with remainder to her children, and if she shall leave no child, in trust for such person or persons "as shall be my heir or heirs at law." The daughter died after the testator, leaving no children. It was argued, that the testator meant his heirs at law, at the time of the death of his daughter, for that the daughter specially provided for was one of them. But the Master of the Rolls (b) said, "the only question is, whether upon the true construction of the codicil it must necessarily be intended, that he did not mean by these words, what the law would *prima facie* strictly speaking intend, heirs at law at the time of his death." "I cannot, upon that ground alone, that the daughter named in the will was one of the heirs at law, hold that heirs at a particular time were intended. My opinion is, that there is not enough in this will to give the words any other than their *prima facie* construction—heirs at law at his own death. If so, it would be a vested interest in the persons answering that description at his own death;" *Doe d. Earl and Countess of Cholmondeley v. Moxey* (c). The judgment of Mr. Justice *Bayley* in that case is extremely strong upon the point. He says, "it is a settled rule not to read a limitation in a will as being a contingent remainder, unless such appears clearly to have been the intention of the testator; but if it will admit of being considered as being a vested remainder, the Court will always read it as such, be-

(a) 5 Vesey, jun. 399.

(c) 12 East, 589.

(b) Sir Richard Pepper Arden.

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cause a contingent remainder is always liable to be defeated, and the intention of the testator thereby frustrated.” *Doe d. King v. Frost* (a) will probably be cited on the other side ; but that case is distinguishable. There, the devise was to the testator’s son, *W. Frost*, and his heirs for ever ; and if *W. Frost* should have no issue, then, at his decease, the estate was to become the property of the heir at law, subject to such legacies as *W. Frost* might leave to the younger branches of the family ; and the Court held that *W. Frost* took an estate in fee, with an executory devise over, in case he died without issue, to such person as should, at his death, happen to be the heir of the testator. The fee was there given in the first instance to the person in whom the remainder would have vested, supposing that the limitation over operated to give a remainder to the heirs of the testator at the time of his death. In that case there could be no question as to a vested remainder ; it must necessarily be intended, that the testator meant the heir at the death of the particular tenant. In the present case, the law will *prima facie* intend that the testator has created a vested remainder ; and there is nothing upon the face of the will from which it can clearly and necessarily be inferred that the testator meant to limit a contingent remainder.

Preston, *contra*. It is not disputed that the law favours the vesting of an estate ; but it is an equally well-established rule, that in construing a will, the Court must inquire of the intention of the testator, and that the intention shall prevail. Wherever the estate devised does not vest on the death of the testator, it is necessarily contingent. In order to ascertain the intention of the testator, the Court will look at the state of the family, and into the four corners of the will. The testator cannot have intended that the estate should devolve by descent, as the argument for the plaintiff imports. There is not a gift to the eldest son by name, or the

(a) 3. Barn. & Alders. 546.

right heirs by character. In both these cases the parties would have taken by descent. The testator meant to give an estate by purchase to the person who should happen to be heir male at the time of the determination of the particular estate. If the heir male is to take by purchase, he cannot have the property unless he answer the full description of *heir male*—and that is, he must be both heir and male. If the eldest son had left a daughter, she could not have taken, for though heir she would not be male; nor could the second son have taken, for though male, he would not be heir. Yet if this be an estate by descent, the daughter would have taken. This would not have answered the testator's intention. *Counden's case (a)*, in principle, runs parallel to this, and fully establishes, that the limitation created an estate by purchase. Then as to the time when the limitation is to take effect, whether at the testator's death, or at the determination of the particular estate. In *Counden v. Clerk*, the testator, after a previous limitation to his son in tail, gave a remainder unto his right heirs male and posterity of him and his name for ever. The testator had a son, a daughter, and a brother. The son died after the testator, without issue. The daughter died, leaving two female children. Upon this, the brother claimed the estate; but it was held that he could not take it, as he did not answer the full description. He was not the heir, the female grandchildren being alive. There was no doubt that if he had been the person who was the heir male at the determination of the particular estate, he would have taken under this limitation. *Phillips v. Deakin (b)* is an answer to *Doe d. Cholmondeley v. Masey (c)*. There the testator gave certain estates in tail; and for default of issue, to such of the uses, intents, and purposes, declared in the will of his late cousin, as should be then existing, undetermined, or capable of taking effect, or as near thereto as the deaths of parties, or other

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(a) Hobart, 31 (the second point); see also 2 Rolle's Abr. 416.

(b) 1 M. & S. 744.

(c) 12 East, 589.

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intervening accidents and contingencies as the rules of law and equity would then admit of. The Court decided that the ultimate remainder was suspended until the failure of issue of the devisee in tail. In *Marsh v. Marsh* (a), there was a devise of stock to trustees, to pay the interest to the testator's son for life, and after his decease to his eldest son and his heirs for ever; and in case of their death without issue, unto his, the testator's, nearest relation, and to the nearest relations of such nearest relation for ever. The Court held that the gift over upon the death of the son without issue was a clear double contingency, one way good, the other not so. There is a note taken from the MS. of Sir Samuel Romilly which says, "Lord Loughborough added, 'the testator certainly meant that the nearest relation at the time of the decease of the son should take the property; not the nearest at his own decease.'" (*Amos*, who took notes for a second argument for the defendant, referred to *Preston* on Estates, 2d vol. page 35). The case of *Doe d. King v. Frost* (b) is a strong authority in favour of the defendant. The decision in *Cholmondeley v. Clinton* shews that the Court will look at the gifts and dispositions contained in the will in order that they may give effect to the intention of the testator, and that there is no fixed invariable rule as to the construction of a limitation. Now, what was the state of this family? There were five sons and one daughter, of whom three sons were of the half blood with the two sons and one daughter. Testators, particularly of this class, look to the time of possession, and not to the time of vesting. If the male heir at the death of the testator is supposed to have been meant, the consequence will be that the testator's son, *William*, will have taken a vested remainder, and thus have excluded the sons of the half blood, which it is not probable the testator intended. The rational construction

(a) 1 Brown's C. C. 292, Belt's edition.

(b) 3 Barn. & Alders. 546, stated *ante*, 528.

(c) 2 Merivale, 171, 173, 344, 353; S. C. 19 Ves. 261; 2 Ves. & Bea. 113; Cooper, 80; 2 Jacob & Walker,

of this will is, that the owner is to be looked for at the determination of the estate for life. If the heir took by descent, the heirs of the maternal line as well as the branches of the second family. If he took by purchase, he would have the largest possible descent. Upon the whole therefore, looking at the will and at the state of the family, it is submitted that the proper construction is, that this was a limitation of a remainder by purchase, to take effect at the death of the particular tenant.

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N. R. Clarke, in reply. It is not admitted that the eldest son would necessarily take by purchase. *Couden v. Clerk* by no means goes that length; though it certainly decides that the party must not only be heir, but male. But assuming that he would take by purchase, still it would vest at the death of the testator. *Phillips v. Deakin* falls precisely within the general rule that effect is to be given to the testator's intention. The devise is to such uses as should be *then* existing, which clearly marks the time of vesting. In *Cholmondeley v. Clinton*, notwithstanding the strong reasons stated by *Bayley, J.* why it must have been the testator's intention to give a remainder to such person as *at the expiration of the estate tail* should be the right heir of *Samuel Rolle*, three of the judges adhered strongly to the opinion that the remainder vested in the person who, *at the time of the settlement*, was the right heir of *S. Rolle*; and *Bayley, J.* only differed from them on account of the very strong reasons stated by him. In *Marsh v. Marsh*, the whole was completely disposed of; nothing was left to descend. There is nothing in this case to shew that the Court must necessarily intend that the testator meant to create a contingent remainder. Why did the testator leave *Daniel* an estate for life if he intended, by the subsequent limitation, to make him or his issue an object of bounty? There ought to be something more than mere probable conjecture as to the testator's intention, in order

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to give the words a different sense from that which they plainly import.

DENMAN, C. J.—We will consider whether the circumstances are such as to take this case out of the general rule.

Cur. adv. vult.

DENMAN, C. J., in this same term delivered the judgment of the Court. The law favours the vesting of estates; and it is an established rule of construction not to read a limitation in a will as a contingent remainder, unless such clearly appears to have been the testator's intention: if it admits of being considered as a vested remainder, it will always be read as such. Consequently where land is given to one for life, or for any other estate upon which a remainder may be limited, and after the determination of that estate to a person sustaining a given character as heir at law, heir male, or next of kin of the testator or of another, the remainder will vest in the person or persons who fill that character at the death of the testator; unless it can be plainly and distinctly made out from the will that the testator intended otherwise. Cases in which the rule is laid down were quoted on the argument; and others were referred to in which the clear intention of the testator to the contrary prevailed. Upon examining the latter class of decisions, it will be found that the intent of the testator that the person who filled the required character at his death should not take, is to be collected in the clearest way from the provisions of the will. In the present case there are none of the circumstances relied upon in those; there is no inconsistency in adopting the general rule; there is nothing to shew that the testator did not mean by the words "heir male at law" what the law would, strictly speaking, intend,—heir male at law at the time of his death. The words are not necessarily confined to any particular time, nor does the case furnish any certain inference that they were so limited. They merely raise a conjecture that this

testator, as other ignorant persons usually do, looked to the period of the actual possession, and not the vesting of the estate in remainder, and had in his contemplation the person who would be his heir at law at that time. In the cases relied on for the defendant, an intent contrary to the general rule was shown. Thus, in the case of *Doe v. Frost*, where the devise was to *W. F.* (the testator's eldest son and heir at law) and his heirs for ever, and if he should have no children, child or issue, the said estates, on the death of *W. F.*, to become the property of the heir at law, subject to such legacies as *W. F.* might leave by will to any of the younger brothers, it was held that the executory devise over vested in the person who would be heir at law at the death of *W. F.* without issue living at his death; for it is clear that *W. F.* himself could not be meant as the heir at law, as then the devise over would have been nugatory, and the power of leaving legacies unnecessary.

Again, in *Phillips v. Deakin*, where the devise was,—to the testator's daughter for life, remainder to her first and other sons in tail male, with remainder over to his niece, her sons and daughters severally and successively in tail, and for default of such issue to such uses and subject to such limitations declared by the will of *Thos. Vernon* as shall be *then* existing or capable of taking effect, or as near thereto as the death of parties will *then* admit,—it was held that *T. S. Vernon*, who would have been tenant in tail in possession under the will of *Thos. Vernon*, took no vested estate under the will in question, for the use of the word “then” clearly shews that until failure of issue of the niece the person to take should not be determined.

In *Marsh v. Marsh*, where there was a bequest of the interest of stock to the testator's son for life, and from and after his decease to his eldest son and his heirs, and in case of their death without issue, to the testator's nearest relation, Lord *Loughborough* held (as appears by Mr. *Bell's* note) that the nearest relation when the event happened must have been intended, because it was impossible to

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suppose that the testator meant his son, to whom he had given the previous estate.

The last case mentioned was *Lord Cholmondeley v. Clinton*, in which the intention to be collected from the recital and other parts of the deed itself was clear, that the limitation to the right heirs of *Samuel Rolle* was not intended to vest in the settlor himself.

The verdict therefore which has been found for the plaintiff must stand.

Rule discharged (a).

(a) And see *Doe d. Winter v. Barn. & Cressw.* 48; S. C. (in error) in *Dom. Proc.* 10 Bingh. 198.
Perratt, 7 Dowl. & Ryl. 733; 5

DOE, on the demise of GRUBB v. The EARL of
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In ejectment by the lord against a copyholder, for a forfeiture by waste, the jury find there has been no damage,—there is no waste and no forfeiture.

EJECTMENT for ten messuages within and parcel of the manor of Prince's Risborough, in the county of Buckingham. The case was sent down for a second trial, and came on to be tried before *Gaselee, J.*, at the summer assizes, in 1832, for the county of Buckingham, when the following facts appeared:

The lessor of the plaintiff was the lord of the manor, the defendant a copyholder. The premises in question were in the occupation of a tenant of the defendant.

31 May, 1819. *Charles Currie* was admitted tenant in trust for *Lord George H. Cavendish* (the defendant) of the premises, described as a messuage or farm house, with all out-houses, edifices, buildings, barns, stables, yards, gardens, orchards and backsides thereto belonging, and also certain lands specified in the admittance. At the period of this admission there were two barns on the premises; one of them was in a ruinous state, and was pulled down by the tenant. Leave was asked of the steward to take it down, but it was refused. The barn was some time afterwards rebuilt by the defendant. This ejectment was

brought for a forfeiture alleged to be incurred by taking down and removing the barn without licence.

The learned judge left three questions to the jury :

1st. Whether at the time when the barn was pulled down, the defendant had an intention to rebuild it :

2dly. Whether any damage had been occasioned to the estate by the pulling down and rebuilding of the barn :

3dly. Whether a custom existed which authorized the pulling down of all buildings, or only those which the tenant himself had erected.

The jury found that the defendant, when he pulled down the barn, did not intend to rebuild it,—but that the estate would have sustained no damage if the barn had not been rebuilt,—and that the custom of the manor only authorized the copyholder to pull down such buildings as he had himself erected. Upon this finding the learned judge directed a verdict to be entered for the plaintiff, and gave the defendant leave to move to enter a nonsuit, upon the ground that as no damage had arisen to the estate, no forfeiture had been incurred. In Michaelmas term, 1832, Sir J. Scarlett obtained a rule nisi accordingly; against which,

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In Trinity term last, *Campbell, S. G., Storks, Serjt. and F. Kelly*, shewed cause. The barn pulled down had not been erected by the tenant, and there is no custom that the tenant shall be dispunishable for waste. The general rule must therefore apply, that by the commission of waste, the estate is forfeited. The question whether any damage had been occasioned to the estate by the pulling down of the barn, was left by the judge to the jury. They have found there was no damage, that is, no pecuniary loss. The question therefore is, whether there can be waste where there is no pecuniary damage. It has been ruled upon the statute of Gloucester, that there must be damage to the amount of forty shillings. But copyholds are held upon condition that no waste be committed; and if waste be

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committed, it is a forfeiture of the estate. Is then the pulling down an ancient building waste? The tenant cannot take upon himself to judge whether the destruction of the building will or will not be prejudicial. In *Bracton* (a) it is said, "Vastum erit injuriosum nisi vastum ita modicum fuerit propter quod non sit inquisitio facienda." This shews that there may be waste where the injury is small. Waste, either voluntary or permissive, is a forfeiture of the copyholder's estate. Many things which the tenant might consider as improvements, the law calls acts of waste. In *Comyns's Digest* (b) it is said, "If a copyholder permits his tenement to be in decay, it is waste." In some cases a court of equity will give relief, and prevent the lord from proceeding, if satisfaction be made to him. But the question here is, whether, according to law, this is waste and a forfeiture. In *Cole v. Greene* (c), the tenant had pulled down a brewhouse and built new houses, and thereby considerably increased the rental, yet this was held to be waste, notwithstanding the improvement. In *Lord Darcy v. Askwith* (d), it was said by the Court, that if the lessee build a house, he must repair it, otherwise it is waste. In *Civitas London v. Greyme*, the altering a mill from one description (e) of mill to another, was held to be waste. In *Co. Litt.* (f) it is said, "The tenant (g) may take sufficient wood to repair the walls, pales, fences, hedges and ditches, as he found them, but he can make no new;" and in a note (h) to this passage from Lord Hale's MSS., it is said, "the tenant cannot make rails (i) where none were before; *Dyer*, 332." In *Rolle's Abridg.* (k) there are a variety of instances in which alterations of the property have been

(a) Fol. 316.

(b) Title *Copyhold*, (M. 3.), citing 1 Roll. Abr. 508, l. 34, (*Rastill v. Turner*). See *Co. Litt.* 68 a; 1 Tho. Co. Litt. 673; Gilbert's Tenures by Watkins, 285.

(c) 1 Lev. 309; S. C. 2 Saund. 228—259.

(d) Hob. 234.

(e) Cro. Jac. 182.

(f) 53 b.

(g) Lord Coke is speaking of tenant for years.

(h) Note 4.

(i) *Posts*, Anon. *Dyer*, 332.

(k) Vol. ii. p. 814.

considered to be waste. In *Alston v. Scales* (a), it was decided that the removal of the smallest portion of the soil must in general be esteemed an injury to the land, because it tends to alter the evidence of title. There is also another reason why this may be an injury to the lord. Suppose that upon the death of the tenant the lord were entitled to an arbitrary fine, that fine must be calculated upon the then pecuniary value of the estate; the materials of the building, if standing, would be taken into the calculation. If the building had been taken away, the lord would then sustain an injury. In *The Keepers and Governors of Harrow School v. Alderton* (b), which was an action on the statute of Gloucester, by the reversioner against the tenant, judgment was given for the defendant on account of the smallness of the damages; yet in *Pindar v. Wadsworth*, which was an action on the case by a commoner, it was held that the smallness of the damages was no ground of nonsuit.

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Sir J. Scarlett and Austin, in support of the rule. The rule of law as to what constitutes waste is not so severe between lord and copyholder as between landlord and tenant. It is admitted that in the case of landlord and tenant, the latter cannot pull down one building and erect another in its place. The lord's interest in the copyhold is much less than the interest of the landlord in the estate occupied by his tenant. The copyholder has a fee simple in the property according to the custom of the manor, and it is he who is interested in the improvements. It may be conceded that the lord has a right to insist that the landmarks of the copyhold be not removed. The jury have found that no damage has arisen to the lord, and upon this ground the plaintiff is not entitled to retain the verdict. From the passage of *Bracton* which has been referred to, it follows as a corollary from the finding of the jury, that if there be no damage, there is no waste. It appeared in

(a) 9 Bingh. 3.

(b) 2 Bos. & Pull. 86.

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evidence, that the copyhold had for a long period been held with a freehold estate, and that in all probability the barn was of comparatively modern construction, as it had been used for both estates. All the witnesses concurred in stating that the barn must have fallen down if it had not been taken down. The landmarks in this case have not been removed or lost. In *Barret v. Barret* (a) it is laid down, that the law will not allow that to be waste which is not in any way prejudicial to the inheritance. Even, therefore, as between landlord and tenant, if there be no damage to the inheritance, there is no waste. In *Coles v. Green* the evidence of title was altered; besides, that is a case between landlord and tenant. In the passage cited from *Rolle's Abridgment*, where the meadow-land was ploughed, the evidence of title was destroyed. The same distinction applies to *Civitas London v. Greyme*. The same principle runs through another class of cases. In *Jesser v. Gifford* (b) it was held, that an action might be maintained by the reversioner for obstructing the lights of a house, although the possessor might also bring an action. In *Jackson v. Pesked* (c), which was an action by the reversioner, it was decided that the act complained of must be alleged to be to the damage of the reversioner: *Strother v. Barr* (d). In the Second Institute (e) it is laid down that waste must be of some particular value. *Sir George Topping v. King* (f) establishes the same rule; and many cases are cited in *Pinder v. Wadsworth* to the same effect. In *Sir Harry Peachy v. The Duke of Somerset* (g), it was questioned whether the stubbing up of fences *within* the copyhold was waste. In *Seigneur de Rutland v. Gie* (h), it was held to be in no waste for the copyholder to open mines. In *Viner's Abridgment* (i) it is said, that "division of a great

(a) Hetley's Rep. 34.

(b) 4 Burr. 2141.

(c) 1 M. & S. 234.

(d) 5 Bingh. 136.

(e) Page 306.

(f) Winch, 5.

(g) 1 Stra. 447.

(h) Sid. 152.

(i) 22 Vin. Abr. 441, *title Waste*,
 [D.] pl. 46.

meadow into many parcels, by making of ditches, is not waste; for the meadows may be the better for it, and it is for the profit and ease of the occupiers of it." In *Parton* and *Ulbert's* case (a) a distinction is taken between a lessee and copyholder, by *Hitcham*, in argument, as to acts of waste; and it is adopted by the Court. To divide and dig the land was held to be waste in the lessee, but not in the copyholder. In *Viner's* Abridgment, tit. Copyholder (b), it is said if a copyholder erects a new house upon his copyhold without leave, this is no forfeiture, for this is for the improvement of the tenement, though he alters the nature of the land by it; and this is not waste in the lessee for years: *Simmons v. Norton* (c). From all these cases, it appears that the principle laid down in *Burton's* Compendium (d) is correct, that before the tenant of a copyhold estate of inheritance forfeits his estate by waste, there should be either an invasion of the lord's property, as by cutting down trees, or at least some act or neglect which tends materially to deteriorate the tenement, or to destroy the evidence of its identity. [*Parke, J.* Suppose the barn had been the sole subject of the grant, would it have been waste to pull it down then?] The jury in that case could not have found that there was no injury done to the estate. [*Parke, J.* There could be no doubt that if the barn alone had been the subject of the grant, whatever the jury might find, the taking of it down would have been waste, because that would necessarily change the evidence of title. Any act which destroys the evidence of title is waste (e).]

Doe d. Earl of Darlington v. Bond (f) was also referred to by the Court.

Cur. adv. vult.

(a) Litt. Rep. 266.

(b) 6 Vin. Abr. 126, Copyholder, [L. c.] pl. 1.

(c) 7 Bingh. 646; 5 Moore & Payne, 645.

(d) Page 411.

(e) *Vide Maleverer v. Spinke*, Dyer, 35 b, 37 a; Co. Litt. 53 b; *Greene v. Cole*, 2 Wms. Saund. 259 n.

(f) 8 Dowl. & Ryl. 738; 5 Barn. & Cressw. 855.

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DENMAN, C. J. in the course of this term delivered the judgment of the Court. After stating what had occurred at the trial, the Chief Justice thus proceeded. By the general custom of copyholds, if a copyholder commit waste, it is a forfeiture: *Comyns's Digest*, Copyhold, (M. 3.) for which he cites 1 *Roll. Abr.* 508, l. 36; *Moore*, 392; and *Owen*, 17, in which last case it is said, that all waste done by a copyholder is forfeiture.

In the quotation from *Rolle's Abridgment*, the language is, if a copyholder commits waste *against the custom of the manor*, this is a forfeiture; and for that he cites *Clifton v. Molyneux* (a), where the qualification is stated, that it must be waste according to the custom of the manor. But without considering whether the custom of the manor need be taken into consideration or not, the custom here found is, that the copyholder may pull down what he has built, but not generally.

Then a question arises, is the pulling down of a barn waste? The instances in which waste has been considered as applicable to buildings, are almost all cases of houses or mills; but in some cases waste has been assigned as to outbuildings. In *Brooke's Abridgment*, *Waste*, pl. 67 (b), waste was assigned, amongst other things in a *stable*. In *Dyer*, 108, it was assigned in a stable. In *Rastel v. Turner* (c), which was a case of forfeiture of copyholds for waste in *burning an outhouse*, no doubt was made as to its being a *forfeiture* by the person who did it; but the case was decided on its being done in collusion for some purposes as to the estate, or the person connected with the copyhold. In *Townsend and Cornwall's Tables of Pleading*, there are several precedents referred to of waste being assigned in

(a) 4 Co. Rep. 27.

(b) Citing 11 *Hen. 4*, 32. (*Thomas Earl of Arundel's* case, M., 11 *Hen. 4*, fol. 32, pl. 59, in which no doubt was expressed as to waste being assignable in a stable, the question being, whether the cir-

cumstance of the timbers of the stable being rotten at the time of the lease, authorised the lessee to cut down timber to repair it.)

(c) Cro. Eliz. 598; 1 *Roll. Abr.* 508, l. 34; 6 *Vin. Abr.* Copyh. [K. c.] pl. 2, [S. c.] pl. 1, 2, 7.

various sorts of outbuildings. And in the statute of Marlbridge, 52 Hen. 3, c. 23, it is enacted, that farmers during their terms shall not make waste or exile (a) of house, woods and men, nor to any thing belonging to the tenements that they have to farm. And though waste be by the common law, this may be considered as a legislative exposition of the subjects in which waste may be committed on the words, "nor of any thing belonging to the tenements which they have to farm." Lord Coke says (b), "There were before particularly named, de domibus, boscis, et hominibus; and these other words, 'of any thing belonging to the tenements that they have to farm,' comprehend land and meadows belonging to the farm." And these general words clearly extend to outbuildings. Lord Coke, therefore, must be supposed to consider that the word *houses* includes all outbuildings; but if not, the general words here used would certainly extend to them. We are, therefore, of opinion that the pulling down of a barn, taken absolutely, *may* be such waste as subjects the copyhold tenant to a forfeiture. But there is another principle applicable to waste, that is, the smallness of the value; and there are a great number of old authorities to shew, that if the value be very small, the consequences of waste do not attach. They will be found collected in 2 Roll's Abr. 824; *Comyns's Digest*, tit. Copyhold, (M. 3); *Viner's Abr.* tit. Copyhold, (L. c.); 2 Saund. 259, *Green v. Cole*. See also *The Trustees of Harrow School v. Alderton* (c). Some of these authorities are not directly in point, for they are decided upon the statute of Gloucester and in actions of waste between landlord and tenant, and it is laid down in *Dench v. Bumpton* (d), that an action of waste will not lie between a lord of a manor and a copy-

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(a) "Exile of men" was, where the particular tenant (for life or for years) so ill-treated the tenants at will, or other tenants paraville, by frequent distresses, and the villeins, by excessive tallages (arbitrary taxation), as to induce the former to

throw up their farms, and the latter to abscond; Fleta, lib. i. cap. ii.; Regist. Brev. 74; Rast. Ent. 694; Co. Litt. 53 b; 22 Vin. Abr. 437.

(b) 2 Inst. 146.

(c) 2 Bos. & Poll. 86.

(d) 4 Ves. jun. 700.

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holder. But they are illustrations of the principle, that where there is no damage, there can be no waste; and to this effect is the case of *Barrett v. Barrett*, cited at the bar, where *Richardson, C. J.* said, "The law will not allow that to be waste which is no ways prejudicial to the inheritance." Upon the whole there is no authority for saying that any act can be waste which is not injurious to the inheritance, either by diminishing the value of the estate, or, secondly, by increasing the burthen upon it, or, thirdly, by impairing the evidence of title. And this law is distinctly laid down by *Richardson, C. J.* in *Barrett v. Barrett*, cited at the bar from *Hetley's Reports*.

This case is entirely clear of the two former grounds; and as the jury have found that the defendant did no damage to the estate, it follows that there was no waste and no forfeiture. The rule must, therefore, be made absolute.

Rule absolute to enter a nonsuit.

CAMPBELL v. RICKARDS and others.

The opinion of under-writers as to the materiality of communicating information as to a particular fact previously to the effecting of a policy, is not admissible in evidence.

The materiality of such a communication is a question for the jury, not for the Court.

CASE against the defendants for negligence as agents. Plea: the general issue. At the trial before *Denman, C. J.* at the sittings after Michaelmas term, the following facts appeared:

The defendants, who are merchants, carrying on business in London, were employed by the plaintiff, a merchant residing at Sydney, in New South Wales, to effect an insurance upon the cargo of the *Cumberland*, from Sydney, to England. The instructions to insure the cargo were contained in a letter addressed by the plaintiff to the defendants, and dated, Sydney, the 28th May, 1827, "per Australia." This letter, after giving directions about some other business in case of the non-arrival of Mr. Emmett, proceeds thus: "I will thank you to effect an insurance at market price, on forty-nine casks, contain-

ing 4175 New Zealand fur seal-skins, shipped to the consignment of Mr. *William Emmett*, per *Cumberland*, or in case of death, to your house; for which purpose I inclose you the bill of lading. The *Cumberland* left Port Jackson for London via Hobart Town, on the 25th April last, and was expected to sail from thence in 10 or 14 days from that date. Insurance to be effected on the goods shipped to my consignment, and the freight payable in New South Wales. To give every chance to Mr. *Emmett's* arrival in England, I have directed my friend Mr. *Harris*, not to deliver the packet till thirty days after the arrival of the *Australia* in London; and should Mr. *Emmett* arrive after you have fulfilled these instructions, you will communicate to him what you have done, as it was mutually agreed on previously to his leaving New South Wales, that in case of accident to him, you should be appointed agents to this concern; in confirmation of which I annex a copy of my letter to you per *Cumberland*, &c."

This letter was sent in an envelope thus indorsed: "Messrs. *Rickards*, *Mackintosh* and Co. This letter is to be delivered by Mr. *Harris* to Mr. *Emmett*, if he has arrived, and if not, to be retained in Mr. *Harris's* possession thirty days from the date he receives it, and then to be delivered to Messrs. *Rickards*, *Mackintosh* and Co." Mr. *Emmett* never arrived in England, and the letter was delivered to the defendants by Mr. *Harris* thirty days after he had arrived in England. The defendants effected the insurance, but omitted to communicate to the underwriters the fact that the letter had been in England thirty days; nor was the envelope of the letter shewn to them. An action was brought by the defendant *Rickards*, as agent for *Campbell*, against the underwriters, in which action a verdict was found for the underwriters. A motion for a new trial was granted, cause was shewn, and after argument, the Court of King's Bench took time to consider, and ultimately refused a new trial, on the ground that the arrival of the letter thirty days previously to the negotiating

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of the insurance, was a fact which ought to have been communicated to the underwriters(a). The present action was brought for the negligence of the defendants in not communicating to the underwriters the fact of the time when the letter had arrived. The plaintiff on this called several underwriters as witnesses, and placing the letter and the envelope in their hands, asked them, "Whether in their judgment it was material to have communicated the fact, that such a letter had arrived in this country thirty days before effecting the insurance." The answer given to this question was, that it was certainly material. These underwriters likewise proved, that if they had been apprized of this fact, and had been asked to insure the vessel, they would have required a higher premium than that which the defendants had paid. The learned Chief Justice left the question to the jury whether the defendants had been guilty of gross negligence. The jury estimated the value of the goods insured at 4700*l.*; the premium at which the goods would have been insured, had the underwriters known the whole of the facts, at 564*l.*; and deducting that increased premium from the value of the goods, found a verdict for the plaintiff, damages 4136*l.*

In Hilary term last Sir *J. Scarlett* obtained a rule nisi for a new trial, on the ground that there was not gross negligence on the part of the present defendants, and that improper evidence had been admitted; against which

First point:
 Whether gross
 negligence.


F. Pollock and *Follett* now shewed cause. The question of negligence was a question for the consideration of the jury, and the decision of the Court in the case of *Rickards v. Murdoch* and another, shews that the under-

Second point:
 Admissibility
 of evidence.

writer was guilty of negligence. As to the admissibility of the testimony of the underwriters who were called as witnesses, to shew the materiality of the fact not communicated, evidence of precisely the same kind was admitted

(a) *Richards v. Murdoch*, 10 B. & C. 597.


in *Richards v. Murdoch*, and this rule must be discharged, unless that case be overruled. It has always been the practice to admit in evidence the opinion of underwriters.

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Sir J. Scarlett and Maule, in support of the rule. With Second point. regard to the admissibility in evidence of the opinions of underwriters, upon a question as to the materiality of matter not communicated, the judgment of Lord Tenterden in *Richards v. Murdoch*, would have been more satisfactory if *Carter v. Boehm* (a), cited in the argument, had been referred to in the judgment. The underwriters were not called to prove a usage, but were asked to give their opinion upon the materiality of the communication—a point which the jury themselves were to consider. In *Carter v. Boehm*, Lord Mansfield makes a distinction between the opinion of underwriters, and the fact of the existence of a usage. The evidence of the underwriters is admissible only to establish a usage, *Elton v. Larkins* (b).

The defendant was not guilty of gross negligence. In First point. *Richards v. Murdoch* this Court took a week to consider of their judgment. How then can it be said that a broker was bound to know the law on the subject? Suppose that in *Richards v. Murdoch* a special verdict had been found, and that this Court had given judgment for the plaintiff, and the House of Lords had reversed that decision, would the broker have then been liable? If the broker be liable, the attorneys who have advised him to defend this action are liable also. Before the cause of *Richards v. Murdoch*, there was sufficient doubt upon the law to excuse the underwriter from the charge of ignorance. But it was not necessary to communicate to the underwriter the time when the letter arrived in England. A party is not bound to communicate his fears and apprehensions. Besides, it was apparent that the letter had come by the Australia. The underwriters are bound to know all that public information

(a) 3 Burr. 1905. (b) 8 Bingh. 198; 1 Moore & Scott, 323.

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could give them. It was unnecessary to tell them what ships had arrived from Sydney; they could have found the information at *Lloyd's*. If the letter had related to nothing else but the insurance of the ship, it might have been contended that it ought to have been communicated; but the order to insure is mixed up with miscellaneous matter.

Third point:
 Estoppel.

The plaintiff cannot recover, since it was his express desire that the letter should not be communicated within thirty days, at the expiration of which period all chance of the vessel's safety would probably be gone.

DENMAN, C. J.—Upon the trial I intended to adhere strictly to the decision in the case of *Rickards v. Murdoch*.

Cur. adv. vult.

DENMAN, C. J. now delivered the judgment of the Court.

This action was brought by a merchant residing in New South Wales, against his correspondents in London, for negligence in effecting a policy of insurance, by means of which negligence the plaintiff was prevented from recovering against the underwriters. The negligence consisted in defendants' concealing from them, at the time of effecting the policy, a material fact within their knowledge.

In Hilary term a rule for a new trial was obtained, on various grounds. It was argued that the fact concealed was not material; and *Rickards v. Murdoch* (a), in which it was held to be so, was denied to be law. At any rate, as that case appears to be at variance with former decisions, it was strongly urged that a commercial man might be ignorant of such a legal point, without gross negligence. The plaintiff was also said to be precluded from recovering, because he did not intend that the fact should be com-

(a) 10 Barn. & Cress. 527.

incommunicated. Lastly, some of the evidence was objected to as received improperly. The opinion of brokers and underwriters having been asked, not on a matter of practice in their professions, but on one of the points on which the jury were to pronounce their verdict, *i. e.* whether the fact concealed was or not material, and ought to have been communicated to the underwriters.

Without saying that the verdict appears in all other respects satisfactory to the Court, we are of opinion that the rule for a new trial must be made absolute on this last ground.

Witnesses conversant in a particular trade may be allowed to speak to a prevailing practice in that trade. Scientific persons may give their opinion on matters of science; but witnesses are not receivable to state their views on matters of legal or moral obligation, or on the manner in which others would probably be influenced, if the parties had acted in one way rather than another.

In the great case of *Carter v. Boehm* (a), a broker who was called as a witness for the plaintiff stated, on cross-examination, that in his opinion certain letters ought to have been disclosed, and that if they had, the policy would not have been underwritten. The jury however found, against the witness's opinion, a verdict for the plaintiff. When his opinion was pressed, as a ground for a new trial, Lord Mansfield, in the name of the whole Court, declared that the jury ought not to pay the least regard to it; that it was mere opinion, and not evidence.

The same doctrine is laid down in a case of *Durrell v. Bederley* (b), by Chief Justice Gibbs, though he received the evidence on great pressure; he said that the opinion of underwriters on the materiality of facts, and the effect they would have had upon the premium, is not admissible in evidence. Lord Mansfield and Lord Kenyan discountenanced this evidence; and I think it ought not to be re-

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(a) 3 Burr. 1905.

(b) Holt, N. P. C. 283.

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ceived. It is the province of a jury, and not of individual underwriters, to decide what facts ought to be communicated. It is not a question of science, in which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, and in which the diversity will be endless. Such evidence leads to nothing satisfactory, and ought on that ground to be rejected.

In some more recent cases, such questions have certainly been proposed to witnesses, but they have passed without objection. And it may be observed that the answers will often imply no more than scientific witnesses might properly state, namely, their opinion on some question of science. This is especially true of medical opinions.

In *Rickards v. Murdoch* indeed, out of which the present case arises, this kind of testimony was received.

In giving judgment on the motion for a new trial, Lord Tenterden did not expressly defend its admissibility, but his words are in the alternative, "If such evidence is rejected, the Court and jury must decide the point according to their own judgment, unassisted by that of others. If they are to decide, all the Court agree in thinking that the letter was material, and ought to have been communicated, and that a jury would have been bound (a) to come to that conclusion."

Now this mode of disposing of the question does not appear to the Court, on reflection, to be quite correct. But we think, that as the jury are to decide on the materiality of facts, and the duty of disclosing them, this verdict, founded in some degree on evidence that could not legally be received, ought to be set aside.

Rule absolute for a new trial.

(a) As to cases in which the jury is bound to take the law from the judge, *vide* note (a) to *Clement v. Clives*, 4 Mann. & Ryl. 138. And see *Haire v. Wilson*, *ibid.* 605, and 9 Barn. & Cressw. 643.

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DODSWORTH v. BLANCHARD (a).

TRESPASS and false imprisonment against a magistrate who had issued a warrant, under which the defendant had been apprehended. Plea: not guilty, and tender of 25*l.* as amends. The replication took issue upon the sufficiency of the amends tendered. The case was tried at the last Yorkshire Summer assizes, before *Denman*, C. J. when the jury being of opinion that the amends tendered were sufficient, found a verdict for the defendant, which

Where the plaintiff replies one matter to a special plea, the Court will not set aside a verdict found upon an issue joined on such replication, upon an affidavit shewing another answer to the plea, which was not replied.

F. Pollock now moved to set aside, and to enter a verdict for the plaintiff for 25*l.* damages. The object of the motion is to get rid of the second plea, and to give effect to the finding of the jury by entering a verdict to the amount of 25*l.* upon the general issue. This was not a case in which tender of amends could be made by the magistrate, as from the circumstances under which the warrant issued, the case is not within the statute (*b*). [*Parke*, J. The pleadings cannot be opened upon this ground, because, by the form of your replication, you have admitted that it is within the statute. The jury can only try the issue upon the record. The replication should have traversed that part of the plea which brings the case within the statute. *Taunton*, J. The plaintiff might have replied the facts which shewed that this was not a case within the statute.] The plaintiff could not plead double. A party may make an application for a new trial, and to amend his pleadings. There has been a failure of justice in this case. [*Parke*, J. There is no greater failure of justice than there is in every case of a special plea, to which the plaintiff has replied a matter which has turned out not fortunate at the trial.] Where the plea is quite false, the Court, it is submitted, will not allow the defendant to succeed finally upon it, if the plaintiff applies to the Court to be relieved. [*Patteson*, J. Suppose a plea of

(a) This motion was made in the (b) 24 Geo. 2, c. 24, s. 2.
early part of the term.

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infancy, to which the plaintiff replied, that the goods supplied were necessities; and at the trial it turned out that the defendant was not an infant, and the jury found that the goods supplied were not necessities, would the Court allow the plaintiff afterwards to amend his pleadings by traversing the infancy? It is submitted that the Court would interfere in such a case for the purposes of justice. [*Denman, C. J.* There is no such case in the books. *Taunton, J.* I never heard of such a course being pursued by the Court.]

DENMAN, C. J.—The same rule must apply to every replication. Parties must make their election as to what they shall reply, and must be bound by their election.

Rule refused.

DOE d. E. ROGERS and others v. FRANCIS COOKE
ROGERS and others.

Whether the best rent has been reserved upon a demise made under a leasing power is a question for the jury; and evidence is admissible to shew that the best rent has, in fact, been reserved, although the leasing power also requires that no premium be taken, and the lease, which is stated to be in consideration of the rent and covenants, contains a covenant by the lessee to maintain three adult children of the lessor, the donee of the power, for a small annual sum, and another adult child for nothing; per *Parke, J.* and *Patteson, J.*; dissentiente, *Taunton, J.*

EJECTMENT, for a messuage and land in the county of Salop, tried before *Taunton, J.* at Shrewsbury, at the Spring assizes, 1833. A *prima facie* title having been shewn in the lessors of the plaintiff, the defendants gave the following evidence:—

By indentures of lease and release (to make a tenant to the præcipe, and to lead the uses of an intended recovery), it was covenanted that a recovery should be suffered; and it was declared that the recovery should pertain to the uses therein mentioned. The indenture contained a power for *Elizabeth Rogers* (to whose use the first life estate was limited); to demise or lease all or any part of the hereditaments thereby released, for any term not exceeding ten years from

the day of the date of those presents, or seven years from the day of the decease of *Elizabeth Rogers*, to take effect in possession, so as there were reserved in such lease *the best rent that could be gotten for the same, without taking any premium for the making thereof.*

17th May, 1831. By an indenture of lease between *Elizabeth Rogers* of the one part, and *Francis Rogers* of the other part. In consideration of the yearly rent therein reserved, and the covenants, provisoes, and agreements therein covenanted, *Elizabeth Rogers* did demise and lease to *F. Rogers* the premises in question, to hold unto *F. Rogers*, his executors, administrators, and assigns, for the term of seven years, to be computed from the day of the decease of *E. Rogers*, yielding and paying yearly, during the said term, unto *E. Rogers*, or the person who for the time being should be entitled to the freehold, immediately expectant on the decease of *Elizabeth Rogers*, the sum of 150*l.*, free from all rates, &c.; the first payment to be made at the end of six calendar months next ensuing the day of the decease of *Elizabeth Rogers*. The deed contained a covenant by *F. Rogers*, for himself, his executors, administrators, and assigns, with *Elizabeth Rogers*, her heirs and assigns, that he, his executors, administrators, and assigns, would upon the commencement and during the continuance of the term, if *Martha, Margaret, and Mary*, children of *E. Rogers*; or any or either of them, should be so minded or desirous, permit and suffer them, or any of them, to reside with him as part of his family in the said messuage or dwelling-house and premises, for so long as they the said three children, or any of them, should think proper, and would, during the time they the said children, or any of them, should so continue to reside with him as aforesaid, find, provide, and allow unto and for each of them good, sufficient, and suitable meat, drink, and lodging, upon being paid for the same by each of them 7*l.* per annum, and so in proportion for any less period than a year. And also would, during the term, permit and suffer *Edward Cooke Rogers*, one of the sons of *E. Rogers*,

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to reside with him in and upon the same dwelling-house and premises, and at the sole expense, costs, and charges of *F. Rogers*, his executors, administrators, and assigns, find, provide, and allow unto the said *E. C. Rogers*, good, sufficient, and suitable board, lodging, and wearing apparel, without having or being paid any allowance or compensation for the same.

The plaintiff contended that the lease was invalid, inasmuch as the covenant to provide board and lodging was in the nature of a premium. The learned judge decided that the lease was void upon the face of it. Evidence was then tendered of the value of the premises, in order to shew that the best rent had been reserved. This evidence the learned judge refused to admit. Verdict for the plaintiff.


In Easter term last, *Maule* obtained a rule to shew cause why the verdict should not be set aside and a nonsuit entered, or a new trial had, on the ground of misdirection and the improper rejection of evidence.

On the part of the plaintiff two affidavits were filed, one by a surveyor, stating that the premises would let for 166*l*. The other stating *Edward Cooke Rogers, Margaret, Martha, and Mary Rogers*, to be of the respective ages of 35 years, 29 years, 24 years, and 24 years.

Whateley now shewed cause. First, the learned judge was right in considering this covenant as being in the nature of a premium; and secondly, he was right in rejecting the evidence of the annual value of the premises.

I. A premium was in reality taken by the tenant for life. The covenant was valuable to the tenant for life, and not to the reversioner. It is laid down, that where, with a leasing power like this, a premium has been taken, a lease cannot be supported, however great the rent reserved, because it is evident that the rent might have been increased if no premium had been taken. In the *Queensbury* case (*a*) it was

(a) 1 Bligh, 427; Sogd. Powers, 5th edit. 626.

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said by Lord *Eldon*, "there is but one criterion which our Courts always attend to as a leading criterion in discussing the question, whether the best rent has been got or not; that is, whether the man who makes the lease has got as much for others as he has for himself; for if he has got more for himself than for others, that is decisive evidence against him." Supposing it had been stipulated to pay each child an annuity, surely that covenant would have vitiated the lease. A covenant to maintain these persons for 7*l.*, is the same in effect as a covenant to pay them an annuity. In *Shannon v. Broadstreet* (a), the sum alleged to be taken as a fine was covenanted to be laid out in improvements, so that there was a permanent benefit to the estate, and therefore to the interest of the reversioner. In *Roe v. Archbishop of York* (b), which may be relied on by the defendant, the question was left to the jury whether the best rent had been reserved; but no question was there raised as to the taking of a premium. In *Doe v. Harvey* (c) there was no question as to any premium. It was said also, that the covenant should not be considered in this case, because it was made with the executors and administrators of the tenant for life, and did not run with the land. However this may be, it is immaterial, because if it was part of the bargain that the lessee should maintain these parties for 7*l.* a year each, and if that operated on the mind of the lessee, the lease is void.

Maule, in support of the rule. The only question is, not whether this lease is duly executed under the power, but whether, in the absence of all evidence, it can be said to be impossible that this should be a good execution of the power. Although a person may suspect it is not good, yet there is nothing conclusive upon the face of it, that it is void. The evidence proposed to be given would have shown that the best rent had been reserved. The rent reserved was

(a) 1 Sch. & Lef. 52.

(c) 2 Dowl. & Ry. 589; 1 Barn.

(b) 6 East, 87; and 2 Smith, & Cressw. 426.

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150*l.* It was said on the other side that a surveyor might be called, who would fix the rent at 170*l.* This would not have been sufficient in such a case. This was a lease from a mother to her son. The evidence proposed to be given was,—that a farmer in the neighbourhood had been applied to, and had estimated the rent at 150*l.*, without reference to this covenant; that the lease had actually been agreed to without this covenant; and that afterwards, the mother being anxious to provide for the younger children, the son consented to enter into this covenant. [*Parke, J.* What age are the children?] They are adults. [*Parke, J.* They were not persons whom the mother was bound to maintain, and therefore the covenant was an advantage to them, but none to her.] This was a family arrangement.

There is some question as to the construction to be put upon the terms of the power. The words are “so as there be reserved in such lease the best rent that can be gotten for the same, *without taking any premium for the making thereof.*” These words are susceptible of two meanings. The plaintiff reads them thus;—so as the best rent be reserved, and so as no premium be taken for the same. The natural meaning of the words is, that such a rent is to be reserved as is the best, without taking any premium. These words do not constitute two conditions, but one condition. If this were a special verdict, the judgment ought to be for the defendant.

Then, as to the question whether the evidence tendered should have been excluded from the consideration of the jury. Can it be said that the lease is so manifestly contrary to the terms of the power that no evidence could establish it? Here is a covenant that the lessee shall support the younger children at a certain sum. The word “premium” does not comprehend every covenant to the advantage of the lessor, or onerous to the lessee. The common and proper acceptance of “premium” is a foregift, or something given beforehand by way of part consideration, and there is no reason for extending the meaning of the word further.

It is not *self-evident* that this covenant is for the benefit of the lessor. It is matter of evidence. The circumstances of the family might be such, that this agreement was beneficial to the lessee. The annual sum to be paid by the lessee is small; but money varies in value in different places, and no Court could therefore decide that the lease was void for this reason. In the *Queensberry* case it is said, the Court must see that there is reasonable care and diligence exerted to get such rent as, care and diligence being exerted, circumstances mark out as the rent likely to be obtained. All that the defendant wished to shew was, that care and diligence had been exerted. In *Shannon v. Broadstreet*, the Court allowed an inquiry whether the covenant to lay out a sum of money in improvements had prevented the best rent from being reserved. It was treated as a matter of fact. In *Roe v. The Archbishop of York*, the question whether the best rent had been reserved was left to the jury. The deed must be taken according to its legal effect, and it will be found, upon examination, that this covenant cannot be enforced. The covenant is of a matter to be done after the death of the lessor. No one but the heir can sue. The executors are not named, and cannot sue. [*Parke, J.* It is a covenant to do the thing during the term, and therefore the executors *can* sue.]

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Executors, though not named, may sue upon a covenant made with their testator in reference to a chattel.

Cur. adv. vult.

In the course of this term judgment was delivered by

PARKE, J.—This case was argued a few days ago before my brother *Taunton*, my brother *Patteson*, and myself. The only question was, whether a lease by tenant for life, under a settlement, was conformable to a power therein contained to lease for any term not exceeding ten years from the day of the date, or seven years from the day of the decease of the tenant for life, "so as there be reserved in such lease the best rent that can be gotten for the same, without taking any fine or premium for the making thereof." The tenant for life granted a lease for seven years, to com-

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mence after her death, at 150*l.* per annum, which lease contained a covenant by the lessee during the term, if three persons, the younger children of the tenant for life, should be minded and desirous to reside with the lessee, to permit them to do so, and to find and provide meat, drink and lodging, on being paid by each the sum of 7*l.* sterling per annum; and also to permit and suffer, during the term, one of the sons of the tenant for life to reside with the lessee, and also to find him board, lodging, and wearing apparel, without having any allowance or compensation for the same. The lease was stated to be granted in consideration of the rent and covenants. On the trial, the learned counsel for the defendant offered evidence to prove that the rent was the best that could be obtained; but my brother *Taunton* rejected it, and held that the lease was upon the face of it void.

The question is, whether that ruling was right.

It seems to my brother *Patteson* and myself that it was not, and that there should be a new trial. Unless the Court can pronounce that it is impossible that the lease can be a valid execution of the power, under any circumstances, the defendant is entitled to have his parol evidence submitted to a jury. What conclusion they ought to come to, is quite a different question.

The power required that the best rent should be reserved that could be gotten, without taking a fine or premium for making it.

Assuming the power to have imposed two conditions; first, that the best rent should be reserved; and, secondly, that there should be no fine or premium, (and that is to put the case most strongly against the defendant,) the question is, whether, upon the face of the lease, it clearly and incontrovertibly appears that either of the conditions has not been performed.

First, as to the fine or premium. In the ordinary acceptance of those terms, none is paid or taken: and if benefit to the tenant for life be equivalent to a fine or pre-

mum, none appears; for it does not necessarily follow that the covenants to support the children are beneficial to the mother, the tenant for life, as all the children were grown up and bound to maintain themselves, and she could not be bound to maintain them after her death. Besides, so far as relates to the daughters, it is impossible for the Court to say that the contract is *necessarily* beneficial to the lessor, if she were bound to support them; for it *may* be beneficial to the lessee; and so far as relates to the son, it is possible that there may have been some collateral consideration for it; as, for instance, a bequest of the personal estate of the lessor to the eldest son, the lessee. If then the Court cannot pronounce that there has been a fine or premium, the only remaining point is, whether *the Court* can say that the rent is not the best that could have been gotten,

That this is, generally, a question for the jury, cannot be doubted. Does the existence of the above-mentioned covenants make it no longer so? Are they so clear a proof that the lessee would have paid more, and consequently that this rent is not the best, that *no* evidence could ever prove the contrary? We conceive that they are not conclusive of this question; and though it is highly probable that a jury would think that the best rent was not reserved, it is certainly possible that such evidence may be adduced as to prove that it was.

The case of *Shannon v. Broadstreet* (a), before Lord Redesdale, is a distinct authority on this part of the case; for he held that a covenant in the lease to lay out 200*l.* in improvements did not necessarily shew that the rent was less than might have been obtained.

For these reasons we think that the case ought to go to a new trial (b).

TAUNTON, J.—There will be a new trial in this case, because my ruling is contrary to the view which has been

(a) 1 Scho. & Lefr. 52.

(b) This was a written judgment, the following was not.

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taken of this case by my brothers *Parke* and *Patteson*. I am bound to say that I entertain the same opinion as I did at the trial. I have endeavoured to bring my mind to the opinion entertained by my two learned brothers, but I cannot at present concur with them. I will state the circumstances of the case. The tenant for life had a common power to lease without taking any fine or premium. In the lease granted by the tenant for life there was a covenant, on the part of the lessee, to maintain three children for 21 ℓ ., and one gratuitously. It struck me that such a covenant necessarily amounted to a premium. I take it the word "premium" does not necessarily mean *money*. Money's worth may constitute a premium. Whether 21 ℓ . be adequate or not to the maintenance of the three children, the obligation to maintain the son gratuitously, necessarily, according to the common course of things, was a loss to the lessee and a gain to the lessor, and is not to be explained away: I have no idea how it can be explained away. If any person would maintain four of my children in this manner, I should consider it a benefit. The power may be exercised on two conditions; that the best rent be reserved; and that no fine or premium be taken. It struck me that one reason why it is required in powers of leasing that no premium shall be taken is, that it is the best way of keeping secure against the looseness and uncertainty of parol evidence as to what is the best rent. Supposing this lease had been made seventy or eighty years ago, it would be utterly impossible to ascertain what was the best rent then; and that question is avoided by requiring no premium to be taken. For this reason I thought that if *any thing* had been taken by way of premium, it was sufficient to avoid the lease. Besides which, I think that a power to lease should be construed strictly and rigorously, because it is a power to be exercised over property which, upon the death of the donee of the power, becomes the right of another. If we once relax the rigour of this rule—if we once open the door to evasion, it is impossible to say where it will end. There-

fore I retain the same opinion. I have tried to agree with the rest of the Court, but I cannot succeed. I dare say I may be wrong, but I cannot see my error now.

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...PATTERSON, J. My brother *Parke* has already given my reasons. When this case goes down for a new trial, either party will have an opportunity of raising the question in another shape.

Rule absolute.

119. *Dawson v. Dyer, Bart.*

COVENANT upon an indenture of lease, made 2d June, 1832, whereby the defendant demised to the plaintiff certain messuages, for the term of 14 years, at the rent of £160; and covenanted that, the plaintiff *paying the yearly rents thereby reserved on the several days and times &c., and observing, performing, and keeping all and singular the covenants, conditions, and agreements therein contained, and which on the part and behalf of the plaintiff, his executors, administrators, and assigns, were and ought to be kept, done, and performed according to the true intent and meaning of these presents, should and lawfully might peaceably and quietly have, hold, occupy, and enjoy the said messuages, with the appurtenances, for and during the said term of fourteen years, determinable nevertheless as hereinafter is mentioned, without any let, suit, trouble, eviction, or interruption; of, from, or by the defendant, his heirs or assigns, or any person or persons lawfully claiming, or to claim, by, from, or under him or them. Breach: that H. B., lawfully claiming, by, from, or under the defendant, entered into and upon one of the demised messuages, and seized and took divers goods and chattels of the plaintiff, as a distress for rent before then due to H. B. from one J. A., for and in respect of the use and occupation of the*

A covenant by lessor that lessee *paying the rent and performing covenants*, shall quietly enjoy, is not a conditional covenant; and a plea stating the non-payment of the rent, or the non-performance of a covenant by the lessee (to insure), is no bar to an action by the lessee on the covenant for quiet enjoyment.

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premises. Plea, (after setting out the lease upon *oyer*, which contained a covenant by the defendant to the plaintiff to pay the rent, and to insure the premises, and a proviso for re-entry in case of breach,) first, *actio non*, because after the making of the lease, and before the committing of the said breach of covenant, rent for one quarter of a year, in respect of the said premises, by virtue of the said covenant for payment of rent, contained in the said lease, was due from the defendant to the plaintiff: Yet the plaintiff would not pay the said rent, but wholly neglected so to do. There was another plea shewing that the plaintiff had never insured.

General demurrer and joinder.

Follett in support of the demurrer. The only question is, whether the payment of the rent by the tenant is a condition precedent to the performance of the covenant for quiet enjoyment on the part of the landlord. [*Parke, J.* It has been expressly decided by *Hayes v. Bickerstaffe* (u), and *Warren v. Astal* (b), that this is not a condition precedent.]

The COURT then called upon the defendant to support his plea.

Barstow, for the defendant. Upon reason and the authority of the cases, it is submitted that this is a condition precedent. To shew what the opinion of the profession is, *Platt on Covenants* may be referred to (c).

First, as to the reasonableness of such construction. The lessor demises the land to the tenant, and the lease contains a covenant on his part for quiet enjoyment. If this were the case of a simple demise without any contract for quiet enjoyment, the landlord would be bound to protect the tenant although he had not paid rent. The covenant for quiet enjoyment is inserted for the purpose of

(a) 2 Mod. 34; Vaugh. 118;
 and 1 Freem. 194.

(b) T. Jones, 206.

(c) Page 100.

limiting the lessor's liability. *Nokes's* case (a). In *Platt on Covenants*, 46, the cases upon this subject, are collected. The object in introducing the covenant was in the first place to limit the responsibility of the landlord, from a general liability in respect of the acts of all persons to a liability confined to the acts of persons claiming under him; and secondly, as the defendant contends, to make the covenant for quiet enjoyment dependant upon the performance by the tenant of all the covenants entered into on his part. According to the grammatical construction of the language used, the performance of the lessee's covenants is a condition precedent to the lessor's liability to protect. After the covenants on the part of the lessee have been exhausted, then comes this covenant on the part of the lessor, "you paying the rent &c., shall quietly enjoy the premises." The lease contains also a proviso for re-entry in case of non-performance of any of the covenants (b). Immediately after the tenant had made default in not paying his rent, the landlord might have brought ejectment, laying the demise the day after the default, and might have treated him as a trespasser. If the landlord can treat the tenant as a trespasser, how can the tenant sue the landlord in respect of another person's entering and distraining upon him? [*Denman*, C. J. According to your argument, though the landlord afterwards accepted rent, he would not be bound to protect the tenant.] The argument need not go to that extent. [*Parke*, J. That is the consequence of it.] If in this case the landlord had accepted the rent, that might have been replied. In *Hayes*

(a) 4 Co. Rep. 80.

(b) If the lease had contained a proviso for making the lease absolutely void on nonpayment of rent, then as no entry would have been necessary to defeat this *chattel* interest, the proviso would probably have been a good bar to the action. But where the proviso merely gives the lessor power to re-enter, the lessee remains liable to the pay-

ment of rent up to the time of an actual entry, without process, or to the day of the demise laid in the declaration, where the lessor proceeds by ejectment; and it appears to be reasonable that the warranty of quiet enjoyment by the lessor should be co-extensive with the liability to pay rent on the part of the lessee.

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v. *Bickerstaffe* (a), there was no proviso for re-entry in case of non-performance of the covenants (b). There is an anonymous case in *Leonard's Reports* (c) which is directly contrary. It is thus stated—"A lease for years is made by deed indented rendering rent, and the lessor covenants that the lessee *paying his rent*, shall enjoy the land demised for the whole term. The lessor did not pay the rent, and afterwards was ejected by a title paramount. By *Walmsley* and *Wyndham*, Justices, the covenant is conditional, and that the lessee should not have advantage of it if he did not perform the condition which is created by this word. (paying). *Periam*, Justice, was strongly to the contrary; that is, that the word (paying) did not create a condition." *Simpson v. Titterell* (d) establishes the same principle.

Per CURIAM.—The covenant for quiet enjoyment was not conditional, and there must, therefore, be

Judgment for the plaintiff.

(a) *Vide ante*, 560.

(c) 4 Leon. 50, case cxxx.

(b) *Vide ante*, 561 (b).

(d) Cro. Eliz. 242.

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Under a policy
 of assurance
 upon a ship
 and cargo "at
 and from the

ASSUMPSIT upon a policy of insurance. The first count of the declaration stated, that on the 5th July, 1830, coast of Africa to her port and ports of discharge in the United Kingdom, beginning the said adventure upon the said goods and merchandize from the loading thereof aboard the said ship *twenty-four hours after her arrival on the coast.*" Held, that no part of the outward cargo was covered by the policy, it not appearing on the face of the policy that the goods on board previously to the arrival on the coast of Africa were intended to be insured. Held also, that a memorandum valuing the cargo at a certain sum, did not operate to make the policy extend to cover a loss of portions of the outward cargo, which continued on board after the vessel had arrived on the coast.

Where, in an action against an underwriter upon a *valued* policy, evidence of the value of goods on board was gone into at the trial, and parts of the cargo not covered by the policy were included in the calculation, the Court sent the case back for a new trial.

In the case of a valued policy, if part of the cargo be not on board at the time of the loss, the assured cannot recover as for a total loss. *Semble.*

the plaintiffs caused themselves to be insured at and from the coast of Africa to her port or ports of discharge in the United Kingdom, with liberty to touch at all ports and places whatsoever and wheresoever, to trade backwards and forwards; and forwards and backwards, and in any order, with leave to call at or proceed to the Azores, &c., and all African islands, and all rivers, for any purposes, upon any kind of goods and merchandizes, and also upon the body, tackle &c. of the ship Mary, beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship twenty-four hours after her arrival on the coast of Africa, upon the said ship, &c., including the risk in boats and craft in loading and unloading, and so should continue and endure during her abode there upon the said ship &c., and further, until the said ship, with all her tackle &c., and goods and merchandizes whatsoever, should be arrived at her port of discharge in the United Kingdom, upon the said ship &c., until she had moored at anchor twenty-four hours, and upon the goods and merchandizes, until discharged and safely landed, with liberty for the ship &c. to proceed to, touch, and stay at any ports and places whatsoever, to dock or heave down, to load, unload, re-load, sell, barter, and exchange. That the assurance was declared to be on the ship, valued at 1,200*l.*, and on the cargo, valued at 4,800*l.*; and that the defendant became, in consideration of 8*l.* 8*s.*, an insurer for 200*l.* Averment, that in the course of the voyage and adventure, to wit, at the coast of Africa, goods of the value of 4,800*l.* were shipped on board the ship mentioned in the policy; that the plaintiffs were interested to the amount assured; that the ship, with the said goods on board, was in good safety at the coast of Africa, and had remained for twenty-four hours after her arrival, and afterwards sailed with the goods on board from Sierra Leone, and proceeded from thence to divers other ports and places on the coast of Africa, where she touched for the purposes of trade; that on 19th August, 1830, at Apollinia, on the coast of Africa, some

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of the goods so shipped, of the value of 1,000*l.*, being in a canoe, were, by the perils of the sea, sunk, and wholly lost; and that at the same place, the best anchor of the ship was also lost to the plaintiffs by the perils of the sea; that afterwards, on 1st January, 1831, at Prince's Island, certain goods and merchandize, being part of the cargo, were taken and carried away by some person unknown, and were wholly lost to the plaintiffs; and that on 1st November, 1831, near a certain place called Axim, on the coast of Africa, the ship, with divers other goods and merchandizes of the plaintiffs, which had been shipped on said voyage, and were then on board the same, of the value of 10,000*l.*, and being the cargo in the said policy of assurance mentioned, by the perils and dangers of the seas &c. was wholly wrecked, foundered, sunk, and was wholly lost to the plaintiffs. Of all which defendant had notice, and was requested to pay the said sum of 200*l.* (a). At the trial at the London sittings after last Hilary term, before *Denman*, C. J. the following facts appeared :—

The plaintiffs insured the *Mary* as stated in the declaration. The ship sailed upon her outward voyage in April, 1830, and arrived on the coast of Africa on the 1st of June, 1830. She was wrecked in June, 1831, more than twelve months after the policy had attached. The vessel, in the first instance, sailed to Sierra Leone with her outward cargo on board, and then took in a quantity of beads and other articles, for the purpose of trading on the coast of Africa, some of which were afterwards lost at Apollonia by the upsetting of a canoe which was conveying them to the shore. The captain, in the course of the voyage, obtained in exchange a quantity of gold dust, 400 ounces of which was stolen at Prince Edward's island. The ship afterwards proceeded to Axim, where she was wrecked, having at the time on board a quantity of oil, gold dust, and other goods purchased since her arrival at Sierra Leone, and also a portion

(a) The declaration contained other counts, upon which no point arose.

of the cargo which she had brought to Sierra Leons from England, to the value of 800*l*. About twenty puncheons of oil, which had been purchased, had not yet been received on board. It being objected by *Campbell*, S. G. for the defendant, that the policy must be opened, because the ship had not on board the whole cargo, which was intended to be valued; evidence was given to shew that the cargo on board at the time of the wreck was of the value of 4,800*l*. In this amount the portion of the outward cargo remaining on board was included. The learned chief justice thought that the policy covered the outward cargo, and a verdict was found for the plaintiff, damages 4,800*l*.

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Campbell, S. G. moved for a rule nisi for a new trial, on the ground of misdirection by the learned judge in directing the jury that the policy was a valued one, and that the outward cargo was covered by the insurance; and also on the ground that the jury should have deducted from the valuation in the policy the value of the oil saved, of the 124 ounces of gold dust saved, and the 400 ounces taken out of the ship at Prince Edward's Island. A rule nisi was obtained; against which,

Sir J. Scarlett, F. Pollock, and Blackburne, now shewed cause. The policy purports to be effected on a vessel about to trade to the coast of Africa, on her voyage out, while remaining there, and until her return into an English port. The words of the policy are, "at and from the coast of Africa to her port or ports of discharge in the United Kingdom, upon the goods and the ship *Mary*;" "beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship twenty-four hours after her arrival on the coast of Africa." Then there is a memorandum that the ship is valued at 1,200*l*., and the cargo at 4,800*l*. The defendant wanted to shew that this was an open policy, and contended that he had a right to open it on two grounds; first, that part of the outward cargo

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was on board, and that the policy was not intended to cover goods shipped for the outward voyage; and secondly, that part of the homeward cargo had not been shipped. From the cases which have been decided upon this point, it is clear that the policy can only be construed to extend to insure goods shipped in Africa to come home. In *Robertson v. French* (a), where a ship and goods were insured "at and from all and every port on the coast of Brazil, and after the 17th September to the Cape of Good Hope, beginning the adventure upon the goods from the loading thereof aboard the said ship at all or every port on the coast of Brazil; and from the 17th September, 1800, and upon the ship in the said manner," it was held that the cargo must be shipped upon the coast of Brazil; and the Court thought that upon the face of the policy it was intended to cover a return cargo. This case was followed by *Spitta v. Woodman* (b). There the insurance was at and from Gottenburg, to a port in the Baltic. The Court held the policy did not attach upon goods laden before the vessel arrived at Gottenburg. The reason of that decision seems to have been, that if an average loss should arise in consequence of damage done to the goods, it would be impossible to ascertain whether it had been sustained before the ship's arrival at Gottenburg or afterwards. These cases have, however, been much shaken by subsequent decisions. In *Hunter v. Leathley* (c) the words of the policy were, "at and from Singapore, Penang, Malacca, and Batavia, all or any of them, to the ship's port of discharge in Europe, with leave to touch, stay, and trade at all or any ports or places whatsoever and wheresoever in the East Indies, Persia, or elsewhere, upon goods" in certain vessels, "beginning the adventure from the loading thereof aboard the said ships as above." The ship took goods on board at Lourabaya; and it was held that these goods were protected by the policy.

(a) 4 East, 130.

(c) 10 B. & C. 858.

(b) 2 Taunt. 416; 16 East, 188, n.

In *Bell v. Hobson* (a), Lord *Ellenborough* said, that a very strict, and certainly a construction not to be favoured, and still less to be extended, was adopted in the case of *Spitta v. Woodman*; and that if there be any thing to indicate that a prior loading was contemplated by the parties, it will release the case from that strict construction. The policy in *Bell v. Hobson* was at and from *Gottenburg* to any port in the Baltic. It contained the usual printed words, "beginning the adventure upon the said goods from the loading thereof on board the said ship," and was declared to be in continuation of former policies from the original port. The Court held that the policy covered goods not loaded at *Gottenburg*. This is a parallel case. The stipulation that the vessel is to be at liberty to go from place to place on the coast of Africa, informs the underwriters that this is a trading voyage, and that the subject-matter of the insurance is that which the ship may have contained, during the whole of the voyage, from the time she began to trade. This latter stipulation as to twenty-four hours would lead them to suppose that some former policy had expired, as in trading voyages the risk always expires twenty-four hours after the arrival of the vessel. Then there are the words, "that the risk of boats and craft in loading or unloading is to be included." These written words control the printed words, "from the loading thereof." *Gladstone v. Clay* (b) shews how slight a circumstance the Court will lay hold of to distinguish a case from the rule laid down in *Spitta v. Woodman*. In *Gladstone v. Clay* the words of the policy were, "at and from *Pernambuco* to *Maranham*, and at and from thence to *Liverpool*, beginning the adventure upon the said goods from the loading thereof on board the said ship, *wheresoever*, &c.," and the policy was held to cover goods loaded at *Liverpool*. The policy should be construed as if "from the loading thereof" were entirely struck out, and the printed words stood without them. A policy of insur-

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(a) 3 Campb. 272; and 16 East, 240.

(b) 1 M. & S. 418.

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ance is a very peculiar instrument, ancient in its form, and not very intelligible in some of its particulars, and gives rise to many doubts, difficult of solution without reference to the practice. In *Robertson v. French*, it is said by the Court, that when necessary, the written words will control the sense of those parts of the printed policy to which, in sound construction and by reasonable inference, they may appear to apply.

Second point:
As to opening
the policy.

11. In *Shawe v. Felton (a)*, which is a remarkable case to shew the importance of a valued policy, it was held that if the goods be of the estimated value when the ship sails, the underwriter will be bound.

If a party puts his goods *bonâ fide* on board the ship, believing them to be of the estimated value at the time when the ship sails, and it afterwards appears that there is reason to suppose that they are not exactly of that value, the underwriter cannot open the policy and inquire into the value of the goods. In *Montgomery v. Egginton (b)*, which was an action upon a valued policy upon freight, Lord Kenyon held, that if the transaction was *bonâ fide*, the assured was entitled to recover the full amount, notwithstanding only a part of the goods were on board at the time the ship was lost. If the argument on the other side prevails, the assured will for the future be bound to put the whole cargo on board, and will not be able to make any exchange without having the policy opened. Independently of the sum of 800*l.*, the value of the part of the outward cargo remaining in the ship, it was proved that the full amount of the policy was on board except about 36*l.* If the policy be opened, still the invoice price of the goods is not the proper mode of estimating the value. The very object of a valued policy is to prevent this, it being quite clear that such a price is no remuneration to the assured.

(a) 2 East, 109.

Maule & Selw. 313; *Etches v.*

(b) 3 T. R. 363. And see *Davison and another v. Willasey*, 1

Aldam, 1 Mann. & Ry. 157.

Campbell, S. G. and Maule, contra. [*Denman, C. J.* Upon the question whether or not the outward cargo is insured, we do not think it necessary to trouble you. Upon the other point we should wish to hear you.] If there be a valuation of goods or of freight, the assurer is only bound by that valuation, if those goods are on board. [*Parke, J.* Then the question is, whether the valuation was intended to extend to all the goods, whether part of the outward cargo or not.] The Court has intimated that the policy does not cover the outward cargo. There is no distinction between an insurance on freight and goods. In *Forbes and another v. Aspinall*(a), the ship was lost when a part only of the goods, the freight of which was insured, was on board, the Court held that the valuation must be opened, and that the assured could only recover for the portion of freight on the goods lost. In that case *Shaw v. Felton* and *Montgomery v. Egginton*, were considered. [*Parke, J.* Then comes the difficulty, how is the proportion to be found, which does not seem to have been taken into consideration in *Forbes v. Aspinall*? *Patterson, J.* This being a valued policy, and worded as it is, I think that it must apply to the whole of the cargo on board, when the ship had arrived twenty-four hours on the coast of Africa.] If the whole of what was valued be not lost, the assured cannot recover for the whole. The part which was not put on board, and which was not lost, continued to be the property of the assured, and it would not be fair to give him the value of the whole. It has been assumed in the course of the argument, that there was an outward policy, expiring twenty-four hours after the arrival of the vessel on the coast of Africa, but that does not appear. And if there had been such a policy, it is probable it would have been in the usual form, and that the goods would have been protected until landed at the several ports on the coast. If the outward cargo is not to be considered in the valuation, then the policy may be opened, in consequence of the abstraction of the outward

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(a) 13 East, 323.

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cargo. If there were no goods on board it might be opened, so if there were a few. [*Patteson, J.* The case of no goods affords no presumption, because there could be no loss.] Suppose the value of the goods on board had been 800*l.*, and of the goods on shore 2000*l.*, and the latter had come safely to the hands of the plaintiff, he could only have recovered 800*l.* The Court has been asked to strike out some of the words of the policy. If those words are immaterial, they should not have been inserted in the declaration. The difficulty of ascertaining the amount of average is not so great as to make it necessary to reject the words in the policy, "from the loading thereof &c." It appears from *Stevens on Averages*, that there are many other cases in which the average is difficult to compute. Suppose the goods are valued at 1000*l.*, and a thousandth part is lost, the insurer ought to pay a thousandth part of the valuation, which he has allowed to be put upon the whole cargo, without considering its real value. Here, the method of calculating the average would be, by seeing the proportion which the part lost bears to the whole amount, 4,800*l.* The general meaning of parties in effecting a policy of insurance, is to have an indemnity, and nothing more. This is a partial and not a total loss. The party is therefore entitled to be paid only for that which he has actually lost.

Cur. adv. vult.

The judgment of the Court was now delivered by

DENMAN, C. J.—In this case, it is with regret that we find ourselves obliged to come to the conclusion, that the plaintiffs are not entitled to recover for a total loss; because it appears very likely that the assured intended by this policy to insure both the outward and homeward cargo, and to have valued both; inasmuch as a great part of the outward cargo would in such a voyage remain on board, and would be continually varying in the course of barter; and nothing is more probable than that the entire cargo should be valued

to prevent difficulty of valuation in the case of loss. Unfortunately, however, they have used words which will not, we think, effectuate that intention. The question in this and other cases of construction of written instruments, is not, what was the intention of the parties, but, what is the meaning of the words they have used? The cases of *Robertson v. French* (a), *Spitta v. Woodman* (b), *Horneyer v. Lushington* (c), *Langhorn v. Hardy and others* (d), have established, that when the policy is upon goods "from the loading thereof," either at a particular place or in blank, upon a voyage from one place to another, it does not attach upon goods previously on board. But this being a strict construction, has been relaxed where there was any thing upon the face of the instrument to satisfy the Court that the policy was intended to cover goods previously on board. Thus in *Bell v. Hobson* (e), where the policy was declared to be "in continuation of others," which were upon a voyage to the port from which the risque insured began; and in *Gladstone v. Clay* (f), where the words used were "where-soever &c." it was held that the assurance was not confined to goods put on board in the course of the voyage insured.

The question then is, whether any thing is disclosed upon the face of this policy, by which the Court can be convinced that it was intended to attach upon the outward cargo; the nature of the voyage, of which the underwriter must be presumed to be cognizant, being also taken into consideration.

The only circumstance which can have this effect is the memorandum, which declares the insurance to be "on the cargo valued at 4,800*l.*;" and it occurred at one time, to a part of the Court, that this raised a presumption that the parties contemplated such a cargo to be the subject of the assurance, as was capable of being valued at the full amount

(a) 4 East, 130.

(d) 4 Taunt. 628.

(b) 2 Taunt. 416; 16 East, 188, n.

(e) 3 Campb. 272; 16 East, 240.

(c) 15 East, 46.

(f) 1 M. & S. 418.

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insured, when the policy attached, i. e. when the ship had arrived twenty-four hours on the coast of Africa, and that the entire cargo, consisting of outward and homeward goods, would alone answer the description.

If this were clearly the meaning of this clause, we agree that we might reject or qualify the words "from the loading thereof aboard the said ship," as we certainly might have done if it had been said expressly in the memorandum, "that the insurance was on the cargo *both outward and homeward*, valued at 4,800*l*." But the difficulty is to make out that this is clearly the meaning of the memorandum in question. Suppose the words of the memorandum had been "on the *homeward* cargo," valued at the same sum, would there have been any inconsistency in making such a valuation; and would the fact therefore of making such a valuation, enable the Court to say, that the word *homeward* must be rejected, and the insurance applied to the whole of the goods on board? or suppose that in the earlier part of the policy, the insurance had been "upon any kind of goods and merchandize, laden on board after twenty-four hours after arrival at the coast of Africa," would the valuation by the memorandum in any way have qualified or varied the subject of assurance? If it would not, neither can it in the present case; for the declaration in the policy that the adventure is to begin from the loading thereof aboard, twenty-four hours after such arrival, is in effect the same thing, and confines the insurance to the homeward cargo.

It is very true that there will be some difficulty in making the proper calculation as to the sum to be paid, on the supposition that the subject of insurance is the full homeward cargo; because on such a voyage it is not easy to say what the value of a full homeward cargo will be, not what proportion of a full cargo is on board at the time of the loss. That difficulty occurred, and nearly to the same extent, in *Forbes v. Aspinall* (a), though it does not seem to have been brought to the attention of the Court; but this

(a) 13 East, 323.

consideration cannot justify us in rejecting the words which cause the policy to attach on the homeward cargo only, and declaring that the policy was meant to include both.

We think, therefore, that there should be a new trial; but it will be much better to refer the average loss, as the plaintiffs are clearly entitled to recover it.

Rule absolute.

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HILL v. The MANCHESTER and SALFORD WATERWORKS COMPANY.

DEBT upon two bonds, each dated 31st August, 1813, under the common seal of the Company, each in the penal sum of 200*l*. Plea: non sunt facta, with other pleas abandoned at the trial. The condition, (in each bond,) as set out upon oyer, after reciting that the Company was by act of parliament authorized to raise any sum not exceeding 100,000*l*. (in addition to moneys raised under a prior act, by which the Company had been incorporated,) by mortgage, or by bonds or promissory notes, under the seal of the Company; and that at a general assembly of the proprietors, held 13th May, 1813, it had been resolved, that for the purpose of raising money, the Company should issue bonds of 100*l*. each; and that the plaintiff had advanced 100*l*., was declared to be for the payment of 100*l*. and interest.

In debt on bond against an incorporated company, where it is shewn that the bond has been sealed with the seal of the company by the proper officer, it is competent to the defendants, under the plea of non est factum, to prove that several of the requisitions of the act necessary to the validity of the execution have not been complied with.

Partnership books are evidence against partners, on the principle that they are the acts and declarations of such partners, being kept by themselves, or by their authority by their servants, and under their direction and superintendence.

A member of an incorporated company, entering into a contract with that company, must be deemed in respect of that contract a stranger.

Entries in the books of an incorporated company are not evidence against a member of the company, in respect of a contract entered into by him with the company, although the act by which the company is incorporated authorizes each member to inspect and take copies of the books, or any part of them.

So, although the entries relate to transactions at a meeting at which such member was present, it appearing that the entries were made after the meeting had terminated, from memoranda made by the clerk at the meeting.

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At the trial before *Denman*, C. J., at the London sittings after Hilary term, 1833, the plaintiff proved the existence of the Company, and produced the bonds sealed with a seal proved to be the common seal of the Company. Evidence was given of a letter to the chief clerk from the actuary of the Company, who had acted for several years in that capacity, transmitting the orders of the directors, in which he directed that these bonds should be given to the plaintiff, in substitution for certain acceptances of the Company held by him. In consequence of this letter the acceptances were given up and the common seal of the Company was affixed to the bonds by the clerk to the chief clerk, who was authorized to execute bills and bonds, under directions sent by the actuary.

The Company was incorporated by 49 *Geo. 3*, cap. cxcii. by which they are empowered to raise amongst themselves 60,000*l.* in shares, and to raise a further sum of 50,000*l.*, if necessary, by shares or by mortgage of the undertaking, under their common seal.

Section 15 directs that general assemblies of the proprietors shall be held twice in the year.

Section 16 authorizes the general assembly to appoint thirteen persons as directors for conducting the business of the undertaking.

Section 24 authorizes any five proprietors, possessing in all 100 shares, to cause fourteen days' notice of a *special* general assembly, specifying the reason of requesting such assembly, and the time and place when and where it shall be holden; and that the proprietors shall meet pursuant to such notice, and shall proceed to the execution of the powers of the act with respect to such matters alone as shall be specified in such notice; and that all such acts, orders, &c. of the proprietors so met, (provided there be ten proprietors present, possessed of, at least, 200 shares,) shall be as valid with respect to the matters specified in such notice, as if the same had been done at any *stated* general assembly.

Section 23 enables the proprietors at any general or special general assembly, amongst other things, to "order and dispose of the custody of their common seal, and the use and application thereof."

Section 25 authorizes the Company at any general assembly to appoint, under seal, their officers and clerks; and directs that the clerk or clerks shall, in a proper book or books to be provided by the Company for that purpose, enter and keep a true and perfect account (*inter alia*) of all acts, proceedings and transactions of the said Company of Proprietors and Directors respectively; and that each proprietor may inspect the same, and also the books of the chief or other clerk of the Company *gratis*, and may demand and have copies thereof, or any part thereof, paying 6*d.* for every 100 words.

Section 28 gives powers to the directors to do certain specific acts, and also enacts that they shall (subject to the orders and directions of the general or special assemblies) have full power to direct and manage the affairs of the said Company.

53 *Geo.* 3, c. 20, authorizes (sect. 1) the Company to raise a further sum not exceeding 100,000*l.* by mortgage (sect. 2), or (sect. 10) by bonds or promissory notes, under the common seal of the Company.

The subsequent acts of 56 *Geo.* 3 and 2 *Geo.* 4, enable the Company to raise further sums.

15 April, 1815, the Company entered into a deed of composition with their creditors, sealed with their common seal, and executed by the plaintiff and by other creditors, whereby the Company assigned all their property to trustees for the benefit of creditors. In the schedule the plaintiff is mentioned as a holder of a considerable number of bonds, including those which form the subject of the present action. The trustees appointed by the deed have accepted the trust thereby created, and have acted under it. Several of the bonds held by the plaintiff have been paid.

The defendants contended that the bonds were not the

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deeds of the Company, inasmuch as no such engagements by bond could be entered into but by the authority of a special general assembly, and, as it was alleged, the meeting at which the resolution to give bonds was passed, was not a special general assembly, duly convened according to the provisions of the 24th section of 49 Geo. 3, c. 192. To prove this latter fact the books of the Company were offered and received in evidence, and certain entries of proceedings read. The plaintiff was shewn by parol evidence to have been present at the meeting in question. The entries were not made at the meeting, but were made afterwards by the clerk, from loose memoranda set down during the meeting. The jury returned a verdict for the plaintiff.

In Easter term last, Sir J. Scarlett obtained a rule nisi for a nonsuit, pursuant to leave given by the learned chief justice at the trial; against which

Campbell, S. G. and *Butt*, now shewed cause. The question is, whether the defendants have met the *prima facie* case of the plaintiff. It is not intended to dispute that where in an action against a corporate body, upon an instrument purporting to be their deed, it is proved to be sealed with their common seal, they may shew that it was affixed against their will, without their knowledge, or without their permission. But when it is put with their knowledge and privity, and by their own officers, they are never permitted to avoid the deed because of some irregularity on their own part. After such *prima facie* evidence, the onus lies upon the defendants, and they must prove by strict evidence that the bond is not their deed at all, not that it was an illegal instrument. The defence set up is no defence under the issue raised by this plea. If there were such an irregularity as made the bond void, this should have been pleaded specially; *Whelpdale's case* (a). [*Parke, J.* That is where the deed is the deed of the party, but void. Here the argument is, that this is not the deed of the corporation,

(a) 5 Co. Rep. 119.

unless the forms directed by the act have been pursued.] The Company are empowered to raise money by bond under seal, but there is no particular provision as to the mode in which the seal is to be affixed, nor is it said that it shall be done by the order of a general or special general assembly. The directors had power to direct that the seal should be affixed to any deed, and by this to bind the Company. It is true the proprietors at a general meeting have power to order and dispose of the custody of the common seal, but it does not therefore follow that the directors cannot make a binding contract under seal, as for instance, for the supply of pipes. If the directors do not act *in disobedience* to any directions of a general assembly, their acts are valid. The words of the statute are only empowering; there are no disabling words; nothing to make void all acts not done in pursuance of the directions. The directions are only to have effect amongst the proprietors themselves, and do not affect strangers to the Company, or any contracts with third parties. Here, the person with whom the Company contract happens to be a proprietor; but he *contracts* in his private capacity, and his case therefore cannot be distinguished from that of an entire stranger. If this objection be tenable, it will be in the power of the Company to make every contract which they enter into voidable, at their option, by omitting to comply with some one of the minute regulations of the 24th section.

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II. The entries in the books are not evidence against the plaintiff. It is laid down by all the text-writers, that an entry in the books of a corporation is not evidence for them unless it be an entry as of a public nature; *Marriage v. Lawrence* (a); *Cambridge Tolls* case (b); *Clarke v. Imperial Gas Light Company* (c). [Denman, C. J. It will not be contended that these entries are evidence, unless they are made so by the act of parliament.] The words of the 25th section, which direct that entries shall be made of the pro-

Second point:
 Admissibility
 of evidence.

(a) 3 Barn. & Ald. 142.

(c) *Ante*, vol. i. 206; 4 Barn.

(b) 1 Moody & Malkin, 429.

& Adol. 315.

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Third point:
 Bonds recog-
 nized by de-
 fendants.

ceedings of the Company, and that the proprietors may inspect and take copies, does not at all affect strangers, but only the proprietors themselves. Unless these books are admitted the defence fails, for the evidence of the presence of the plaintiff at the meeting in question is nothing, unless coupled with the entries.

III. It was argued for the plaintiff, that the deed of arrangement recognized the bonds as valid and subsisting bonds under the seal of the Company (a).

Sir *J. Scarlett* and *Tomlinson*, contra. The argument for the plaintiff is divided into three parts; 1st, that the defence cannot avail under the general issue; 2dly, that the entries from which the facts for the defence are collected are not evidence; and thirdly, that the bonds have been recognized by deed, and thus rendered valid.

Third point.

III. The deed of arrangement is not the deed of the Company; and supposing it to be so, it amounts to a recognition, not of the *validity* of the bonds, but only of the existence of bonds having the seal of the Company affixed to them. [*Patteson*, J. If the deed was a recognition of the bonds, with a reservation of a power to investigate the consideration, this should have been pleaded specially.] The investigation would not be *confined* to the point of consideration.

Second point.

II. Upon principle, and upon the authority of the case cited, no objection can be made to the general proposition, that entries in a company's books are not evidence of matters touching their private property. But that case only shews that the books are not evidence of particular facts, unless they be of a public nature. It is otherwise where the entries are of the formal *proceedings* of the corporation, entered in the book in due course, at a time when there can be no suspicion of a false entry, or where it is of a particular fact not touching the private property, and of which the books are the only evidence; as to shew whether a man was trea-

(a) Upon this point the Court gave no judgment,

suror in a particular year. So, upon the question whether a lease was executed by proper authority, the entries are the only evidence. It is said, that the plaintiff was a mere stranger. This is not so; he is a partner. Suppose the case of an ordinary partnership: if one of the partners contracted with the rest, as with the partnership, would not the books of the partnership, to which he had access in the character of a partner, be evidence against him? The plaintiff was present at the meeting, was one of the proprietors, and was most intimately mixed up with the affairs of the Company. He cannot now say that he is a stranger, because he has taken a bond. [*Parke, J.* He has not signed or recognized these entries; if he had done so, they might be evidence as admissions. In the case put of a partnership, the books are evidence against the individual partner dealing with the partnership, because he has access to the books, and may alter them, and his not doing so is evidence of acquiescence. Here, what power has the party to alter the entry if it be false?] He may inspect and represent at the next meeting that the entry is erroneous [*Denman, C. J.* Non constat that the knowledge of the mis-entry is brought home to him. The entry is not made at the time of the meeting, but afterwards, by the clerk, who is not *his* servant, but the servant of the select body.] Here, the party was present at the time of entering into the resolution, and had the power of inspecting the books afterwards. This is at least *prima facie* evidence against him.

I. It was not necessary to plead the matter of defence specially. Where the deed is good as to its execution, but void on account of some defect in the consideration, as in the case of usury, the defence must be pleaded specially; but where the *validity of the execution* is denied, evidence to establish this defence may be given under non est factum. The seal of a corporation is like the seal of a private individual, who under this issue might shew that his seal had been put upon a deed without his knowledge. [*Denman, C. J.*

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We do not think it necessary to hear any further arguments on that point.]

The seal here has not been affixed by the corporation. The Company is created by act of parliament, and has not authority to execute a deed otherwise than according to the particular terms of that act. If these terms be not complied with, there is no execution *by the Company*. It is said that the words of the section respecting the convening of the special general assembly are not prohibitory. Thus far is clear, that the section makes void all acts done of which notice has not been previously given. If the argument on the other side were well founded, there might be twenty adjournments of the meeting, and at last two proprietors at an adjourned meeting might part with the whole corporate property.

Partnership
 books, why
 evidence
 against partner.

Campbell, S. G. This case has been likened to that of a partnership. In the case of a partnership, the books are evidence against a partner, not on the ground of access, but because they are kept by a clerk, who is his agent, or by a partner, who is also his agent. [*Parke, J.* That is the true ground upon which they are evidence.] Then it is said that the Company cannot execute a deed except under the act. That is not so. The moment a company is incorporated, and a common seal is given to them, they become empowered to bind themselves by deed.

Sir J. Scarlett.—It is true of an old chartered company, that upon a seal being given to it, the Company would at once have power to bind itself by deed; but it has been repeatedly laid down, that a corporation created for a particular purpose mentioned in the instrument of incorporation, has no ability to do any act for which authority is not expressly given.

Cur. adv. vult.

The judgment of the Court was on a subsequent day in this same term delivered by

DENMAN, C. J. (who after stating the manner in which the point arose, proceeded thus):—The plaintiff proved that the common seal of the Company had been affixed to the bonds by the officer whom the act required to have the custody of it; and so threw upon the defendants the burden of clearly proving that it had not been set by their authority; *Clarke v. Imperial Gas Company (a)*. The plaintiff further shewed that the actuary managing the affairs of the Company had directed that the bond should be executed. The defendants undertook to make out in their defence, that though the bond was so executed, several requisitions of the act, necessary to the validity of such instruments, had not been complied with. And it appeared to the Court that such evidence might be admitted under the plea of non est factum. We thought the doctrine of *Whelpdale's case (b)* inapplicable; the defendants' case being, not that the deed, *though executed by them*, was invalidated by collateral matter, but that having been executed in defiance of the enactments which alone gave them power to execute such instruments, it was not, in point of law, *executed at all*. Recourse was had to the 29d section of the act, which places the common seal at the disposal of the proprietors at large. But we all thought that this clause only empowers them to make rules and regulations for its custody, and does not require their concurrence in each particular act of sealing. The defendants then contended, that the bond was given for a purpose which required the sanction of a special general assembly; that such assembly was, by the act, to be convened only by requisitions from proprietors of a certain number and value, after fourteen days' public notice; and that such meeting should consist of a certain number; and they attempted to prove that all these important safeguards for the interest of the great number of proprietors had been neglected in this instance, and the bond executed by the resolution of a meet-

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(a) 4 Barn. & Adol. 315; *ante*,
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(b) 5 Co. Rep. 119.

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ing, at which all these requisites were wanting. These points of fact, however, could only be established by the books kept by the clerk of the Company; and the question now to be decided is, whether they are evidence against the plaintiff. It was argued that they were, because he was a proprietor, and the books of a partnership are evidence against one of the partners; and more particularly as the act requires such books of the proceedings to be kept, and that all the proprietors shall have free access to them at all reasonable times. We are, however, of opinion, that the principle on which partnership books are evidence against the partners is, that they are the acts and declarations of such partners, being kept by themselves, or, by their authority, by their servants, and under their direction and superintendence. But the clerk of the Company once appointed, is subject to the control of no individual member; and the free access provided for is only for the purpose of inspection. A proprietor entering into a contract with the Company must be deemed a stranger, and can be affected by no entry made under orders from the entire body. Parol evidence was, indeed, produced to shew that the plaintiff was actually present on the 7th April, when the resolution to affix the seal to his bond was passed. But the circumstance that the number then attending was less than that required by law, could only be proved by inspection of entries in the book, which were not written in the plaintiff's presence, but made out afterwards from rough memoranda by the clerk. On a former trial between the parties, before Lord *Tenterden*, a deed of composition between the Company and several persons having claims upon them, including the plaintiff, had been given in evidence, to prove an express recognition of that bond under the seal of the Company. The bond was then held by Lord *Tenterden* to be set up by that acknowledgment, even though informal or irregular in its origin; and a rule for a new trial, founded on an objection to that ruling, was refused by the Court. The same evidence was received on the trial of this case, and its effect

has been much questioned in the late argument before us. But it is not necessary that we should deliver any opinion on that subject, as we are clearly of opinion that the books of the Company are not admissible in evidence for the purpose of establishing the facts therein mentioned against the plaintiff suing the body corporate.

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Rule discharged.

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INDICTMENT for the non-repair of a road lying in the east side of Hobhole Drain, in the parish of Leake, in the county of Lincoln, beginning at a bridge called Simmons House Bridge, situate in the parish of Leake, and continuing from thence in a northerly direction towards and unto a bridge situate at Lade Bank, in the said county, containing in length 1160 yards, and in breadth 11 yards. At the trial before *Tindal*, C. J. at the Summer assizes, 1831, for the county of Lincoln, a verdict of guilty was entered, subject to the opinion of this Court on the following case :

By 41 *Geo. 3*, cap. cxxxv, for the better and more effectually draining Wildmore Fen and West and East Fens, &c. in the county of Lincoln, certain commissioners were appointed and authorized to make the drains and other works therein prescribed; and, amongst other things, the commissioners were required to make a new cut, or main drain, from Hobhole Gowt, in the river Witham, in a northerly direction to Bennington Bridge, and thence in continuation to Simmons House Bridge, and from Simmons House Bridge across the Lade Bank, and thence to the lands of Toynnton St. Peter's; which main drain at Bennington Bridge

A road dedicated to and used by the public, becomes a highway, which the parish must repair, although neither such dedication nor such user have been adopted or acquiesced in by the parish.

Where drainage commissioners are directed by act of parliament to purchase lands, cut drains, and cleanse them when cut, by placing the mud upon the banks, it is competent to such commissioners to dedicate such

banks to the public as a highway; per *Denman*, C. J. and *Parke*, J.; dissentiente, *Littledale*, J.

Whether one act of repairing on the part of the parish can be construed as an adoption of a highway, *quære*.

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was to be made not less than twenty-eight feet wide at the bottom, with a batter of not less than two feet on each side to every foot in depth. By a subsequent clause in the same act, the commissioners were further required to dispose of all the earth and soil arising from the several cuts and drains thereinbefore directed to be made, in forming banks on each side thereof respectively, at least six feet distant at an average from the verge of the slopes or batters. And it was further enacted, that the several cuts, drains, dams, banks, forelands, and other works thereinbefore directed to be executed by the commissioners, should be made, done, and executed under the direction and control, and to the satisfaction of certain general commissioners, and should, from and after the completion thereof, be vested in, and for ever afterwards remain, continue, and be subject to the power, jurisdiction, and sole control of the general commissioners, or any five or more of them, in like manner as if the same had been made, done, and executed under the authority of 2 *Geo. 3*, cap. 32, whereby the general commissioners had the same powers of purchasing land or making compensation for the purposes of such drainage as in 41 *Geo. 3*, cap. cxxxv, which lands, when so purchased, were to be conveyed to the general commissioners, &c. entirely divested from the vendors, as in 41 *Geo. 3*, cap. cxxxv, and vested in the commissioners for the purposes of 2 *Geo. 3*, cap. 32. And it was further enacted, that the commissioners should have full power and authority to agree with the proprietors of, and persons interested in, any lands or tenements which the commissioners should judge necessary or expedient to be cut, dug, or otherwise made use of for the purposes of the act, for the purchase of the same, or for allowing compensation for any injury done thereto; and that in case of purchase, all such contracts, agreements, sales, conveyances, &c., should be valid and effectual to convey all estate and interest of the person conveying, and all right, title, estate and interest, trust, or claim of any person whatsoever, to the commissioners.

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The commissioners forthwith made a drain called Hob-hole drain, as directed by the act, in a straight line from Hobhole, in the river Witham, to Toynton Saint Peter's. The length of this drain, from Hobhole to Bennington Bridge, is about six miles; from Bennington Bridge to Simmons House Bridge, about 814 yards; from Simmons House Bridge to Lade Bank, 1160 yards; and from Lade Bank to its termination in the lands in Toynton St. Peter's, about 4 miles. The commissioners made a bank on the east side of the drain, with earth taken from it in the manner directed by the act, and of the average breadth of 40 feet. The drain and bank from Bennington Bridge northward, to Lade Bank, was never part of the fen, but was old inclosed land, and is bounded by old inclosures on both sides; and the land upon which they are respectively made, was purchased by the commissioners for the purposes of the act. The bank has been used twenty-five years, by all persons, as a public highway for horses, carts, and carriages, without intermission, and is a very convenient and useful road for the public. About two miles of this road, commencing at Bennington Bridge, and extending northward toward Toynton St. Peter's, are in the parish of Leake. The part indicted is that part of these two miles between Simmons House Bridge (in length 1160 yards) and Lade Bank. It is in the parish of Leake, and out of repair, as charged in the indictment. There is a road, joining the road in question, from Simmons House Bridge, leading to Leake town.

By virtue of 41 Geo. 3, cap. cxxxv, certain commissioners for draining the East and West Fens set out, and in Sept. 1820, awarded a public carriage road of the width of 50 feet, beginning at Lade Bank, at the northern termination of the part of the road now indicted, and forming a continuous and straight line therewith, and proceeding along the said east bank to the northernmost extremity thereof, where it joins another public highway. The parish of Leake has always repaired the part of the road on the east bank, from Bennington Bridge to Simmons House Bridge, and from

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Lade Bank northward as far as the parish extends. About ten years ago that parish repaired a part of the road indicted, namely, between Simmons House Bridge and Leake Bank. If the Court shall be of opinion that the parish of Leake is liable to repair the part of the road indicted, the present verdict is to stand; if not, a verdict of not guilty is to be entered.

Whitehurst, for the Crown. This case is of great public importance, as nearly the whole of the lower part of Lincolnshire has been converted into valuable land by means of drainage, and many of the banks of the drains are used as highways. If it be held that these banks may not be so used, very serious inconvenience will arise to the public, as the communication between the inhabitants will, in many cases, be cut off. It is to be contended on behalf of the defendants, that the general commissioners had no power to dedicate the road in question to the public, and that if they had this power, they have not exercised it; also, that an adoption of the road is necessary, and that in this case there has been no adoption on the part of the parish of Leake. As to the first of these objections, this principle is established by a class of cases,—that an owner of the fee may dedicate the surface of the soil as a road to be used by the public: and by another class of cases,—that if there be no owner of the fee simple to dedicate the road, a highway is constituted on the mere user by the public. *Rugby Charity v. Merryweather* (a) (which was a case of trustees), *Rex v. Lloyd* (b), and *Rex v. Edmonton* (c). The owners of the fee simple in this case, were either those who had been the owners of the land before the drainage, or the commissioners. By 41 Geo. 3 (d), the lands purchased by the commissioners were to be conveyed to them, and divested out of the vendors. It is not intended, therefore, to be argued, that the vendors had

(a) 11 East, 376.
 (b) 1 Campb. 260.

(c) 2 M. & M. 24.
 (d) *Ante*, 584.

the power of dedication ; but if they had, as this road has existed for 25 years without interruption, it will now be presumed that they have dedicated it. Either the commissioners have the power of dedicating this road to the public as the owners of the fee simple, or it is one of those cases where there is no person to dedicate. The commissioners had the same power over the land as every other owner in fee simple, unless where contrary to the purposes of, or inconsistent with, the powers given by the act ; but it is not inconsistent with the object of the act that this bank should be used as a road. The object of the act was to drain the land. It was immaterial what became of the soil. The bank is not like a sea bank, necessary to the preservation of the adjoining land ; it was a mere place of deposit for the earth dug out of the drain. The bank is six feet from the drain, and the intervening space is sufficiently wide to be used as a place of deposit when the drain is cleansed, and most probably was directed by the act to be left for that purpose. The commissioners had the power of making the bank any size and height they pleased ; they could let the surface of it, as appears by s. 35, for pasturage, or have sold it ; and had, in fact, the sole control over it. Why might they not then dedicate it to the public ? But if the commissioners had not the right of dedication, it is clear no other persons have ; and then it comes under the second class of cases above referred to, viz. where there is no person to dedicate, in which case mere user by the public for a length of time, of itself constitutes a highway. *The Trustees of Rugby Charity v. Merryweather*, before referred to, was a case of this sort ; for there the owners of the fee simple were trustees for a special purpose, and had no power to dedicate any more than these commissioners. [*Denman*, C. J. There the trustees were treated as ordinary owners of the soil.] That was not the case in *Rex v. Edmonton (a)*, for there Lord Tenterden expressly says, " In ordinary cases of dedication there is an owner of the land ; here there is none, except as directed by the acts ;

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(a) 2 Mood. & Malk. 24.

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and the case will turn on this question only, whether or not the parish repaired under a mistaken notion of liability. If you think they acted not on a mistaken supposition, but on a voluntary disposition on their part, to repair a road which was certainly useful to a large class of his majesty's subjects, and for the convenience of the public, then you will convict." Now there was no dedication in that case, or if there was it must have been by the churchwardens of Edmonton, and they stand precisely in the same situation as these commissioners; it is but changing the name; they are both trustees to carry into effect a private act of parliament; *Rex v. Wright (a)* is similar in principle, [*Parke, J.* There it was proved, though not so reported, that the soil was in the lord of the manor;] and *Rex v. Mellor (b)*. From these authorities it appears then that where there is no person to dedicate, but the public have for a long period used the road, they are entitled to continue the use of the road, and the parish must repair it. If the parish can get rid of their liability after an user of upwards of twenty years, they may do so a century hence; the inconvenience of which would be very great; for houses and villages may have been built, with reference to the road, which, if it is stopped up, may become useless; and here indeed there actually is another road connected with this, and there is no means of getting into that road except by passing along this road. [*Parke, J.* It is not stated in the special case that there is no other means of getting into that road.] It is there stated that the road is made at its termination of the same width, and forming a continuous and straight line; which necessarily implies it; besides, it may here be observed, if the commissioners have not power to dedicate, they have not a power to stop up, and therefore it *must* be a road as long as the public choose to use it.

Then with respect to the adoption of this road by the parish. It is to be observed that this doctrine of adoption is quite novel, but it is not necessary here to impeach it,

(a) 3 Barn. & Adol. 681.

(b) 1 Barn. & Adol. 32.

because it is stated that the parish has always repaired the part of the road on the east bank, from Bennington Bridge to Simmons House Bridge, and from Lade Bank northward as far as the parish of Leake extends. This bank is one entire bank made at the same time, and a parish cannot adopt *part* of a road. The benefit and the burthen of the whole must be taken together. If a street be thrown open, the whole becomes a highway, and not any particular part which the public please to adopt. Indeed the judges by no means seem agreed with respect to this principle of adoption. In *Rex v. St. Benedict (a)*, *Bayley, J.* says, that there must be some acquiescence on the part of the *parish*. In other cases the judges have said, that it is sufficient if the road be adopted by the *public*. In *Rex v. Mellor (b)*, *Bayley, J.* says, "there was no adoption by the *public*, no adoption by the *parishes*;" *Littledale, J.* says, "a road becomes public by an acceptance of the right by the *public* or the *parish*;" and *Parke, J.* speaks of the *public*. [*Parke, J.* The parish is bound to repair all *public* roads; but it must be shewn that the road is used by the public.] Here, the road has been used by the public for twenty-five years, and part of it has been repaired by the parish. Either the whole or no part of the road is adopted. They have repaired a part, and must adopt the whole, but it is not necessary to argue this, for they have repaired this very part indicted. The parish is estopped, by matter in pais, from saying that this is not a highway; after holding out to the community at large that it is a public road, they cannot now turn round and contradict their own act. [*Denman, C. J.* One act of repairing cannot be an estoppel.] It may operate as an estoppel if others acting upon the faith of it would be thereby prejudiced.

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Waddington, for the defendants. It is submitted that this is not, and that in point of law it never could become

(a) 4 Barn. & Alders. 447, 450.

(b) *Ante*, 588.

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a public road. The land, after it was bought by the commissioners for the purposes of the act, was converted into a drain, and the commissioners may yet have occasion to make use of it. It is admitted that a user by the public of a road for twenty years, will make it a highway. But assuming that the commissioners could dedicate this road to the public, the user by the public is in this case explained.

The commissioners, however, had no power to dedicate this road, or to permit the public to use it. The land was purchased for the purposes of the act. The commissioners may have occasion to cleanse the drain, and it seems impossible that they could do so without obstructing the road during that operation. According to the argument for the crown, if they did do so, they might be indicted for a nuisance in obstructing the highway. If the cleansing of the drain would become indictable, the commissioners cannot effect the purposes of the act. The commissioners had power to widen and deepen the drain, and could not use the banks for this purpose without causing a partial obstruction of the road. If they could allow the public to use any part of the banks, they might allow them to use the whole of it; and if the whole is to be considered as a road, the commissioners could not perform their public duties without making themselves liable to an indictment. No case has been cited in which there has been a dedication by trustees of land, upon which they had some public duty to perform. In *The Trustees of the Rugby Charity v. Merryweather*, the trustees were considered as private individuals. *Rex v. Edmonton* was the case of a road actually set out by commissioners of inclosure. There, the churchwardens did not hold for any public purpose, but for the benefit of certain land-owners, and in fact represented private persons. No decided authorities have been found. Mr. *Starkie* says, that a question similar to this arose on the northern circuit. Where a party has the power to dedicate, and a consideration for it is shewn, it may be

presumed that a dedication took place, but there can be no presumption of a violation of a public duty (a).

Supposing the commissioners had a right of dedication, no jury would, under the circumstances, presume there had been an adoption in this case. In *Rex v. St. Benedict, Bayley*, J. says, "Admitting that in this case there was a dedication to the public, (which I think does not sufficiently appear,) and that the road was found to be a public benefit, (which I am not sure is the case,) I think that in consequence of the want of some act of acquiescence or adoption by the parish, they are not liable to the repair of this road." In *Rex v. Cumberworth* (b), Lord Tenterden says, "Here there was no act of acquiescence by the defendants; and according to *Rex v. St. Benedict* and *Rex v. Mellor*, some such act was necessary at all events to make them liable." In *Rex v. Cumberworth* therefore *Rex v. St. Benedict* is distinctly recognized. Here, there is not sufficient evidence of adoption by the parish of the part of the road indicted; it is only found that the parish, ten years ago, repaired a part of the road.

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Whitehurst, in reply. The power of purchasing the land at the side of the drains was given to the commissioners merely that they might have some place of deposit for the earth; and the act did not contemplate any further use of it. A space of six feet is left on each side of the drain; which is sufficient as a place of deposit. It is said that the commissioners might be considered as trespassers, if they obstructed the road. There can, however, be no objection to give the public a qualified right of way, subject to the right of the commissioners to cleanse the drain as occasion may require. The commissioners are empowered to enter upon any lands within the fen; they may therefore, for the purposes of the act, enter even on old highways. The argument

(a) See *Williams v. East India Company*, 3 East, 192; *Smith v. Huson*, 1 Phillimore, 287; *Calder v. Rutherford*, 3 Brod. & Bingh. 302; *Rex v. Hube, Peake*, N.P.C. 131; Mann. Dig. 2d ed. 143, title *Evidence*, pl. 341.

(b) 3 Barn. & Adol. 119.

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therefore entirely fails; and though they had dedicated this to the public, they would certainly have a right to go on the highway as well as the public at large, and might cleanse the drain. There is no pretence for saying that there would be an inconvenience in allowing the public a right of passage. Four miles of this very bank was set out by commissioners under a subsequent inclosure act, as a public road. It has been argued that the commissioners may have occasion to widen and enlarge the drain. The act directs what the depth and width of the drain shall be; which shows that the legislature did not contemplate that any alteration would be made; therefore the commissioners have no power to alter them. Then it was urged that the lands were purchased for the purpose of the drainage, and could not be appropriated to another purpose. The commissioners had the power, if they thought fit, to throw the earth on the opposite side of the drain, making compensation to the owner of the adjoining land.

As to the case mentioned by Mr. *Starkie*, the facts of the case are not before the Court, and this drainage act was just as much an act for the individual owners of the property in the fen, as the inclosure act in *Rex v. Edmonton* was for the owners of property in Edmonton; and the commissioners and trustees had the same sort of property in the land and the same right over it. The doctrine laid down in *The King v. St. Benedict* is very doubtful, as has before been observed. It was for the first time broached in that case; and with every respect for the judges who decided it, their right to introduce a new law may be questioned. In *Rex v. Cumberworth*, Mr. J. *Patteson* seemed rather to doubt the authority of that case; and if *Rex v. Edmonton* be good law, there is an end of the case of *Rex v. St. Benedict*. If, however, it be necessary to shew an adoption by the parish, there is an adoption of this very part by repairs ten years since, besides an adoption of other parts, which, it is submitted, is an adoption of the whole. (This case was argued in Easter term last.)

Cur. adv. vult.

The judges differing in opinion, now delivered their judgments seriatim.

PARKE, J.—The questions raised on the argument of this case were three: First, whether it was competent for the persons in whom the soil was vested to dedicate the use of part of it to the public as a highway, it not being disputed but that if it was, such dedication had taken place: Secondly, whether it is necessary, in order to charge the parish, that it should have adopted the highway: and if it was, Thirdly, whether the parish had in fact adopted it.

I have never entertained the least doubt upon any of these questions except the first. Upon that I have felt some difficulty; but after much consideration, my opinion is, upon the statements in this case, that the commissioners in whom the property was vested *might* dedicate part of it to this special use. If the land were vested by the act of parliament in commissioners, so that they were thereby bound to use it for some special purpose incompatible with its public use as a highway, I should have thought that such trustees would have been incapable, in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the act, then I think it clear that the commissioners have that power. The mere circumstance of their not being *beneficial* owners cannot preclude them from giving the public this right. Let us consider then, whether the special purposes indicated by the act of parliament are inconsistent with the use of the bank as a highway. The land over which the alleged road passes, was purchased by the special commissioners appointed under 41 Geo. 3, cap. cxxxv. under section 19 of that act. Whether it was conveyed to them or their appointees under section 19, on a voluntary purchase, or, under sections 26 and 27, after an assessment by a jury to the special commissioners, in trust for the general commissioners, does not appear; but in whomsoever the title was vested, it must have been held in trust for the special purposes of the act. What then were these

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First point:
Power of dedi-
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special purposes? The case does not state whether the powers given by 41 *Geo. 3*, cap. cxxxv. to the special commissioners appointed under that act, have terminated or not. By section 11 they are authorized, empowered and required to make certain new gowts and drains; and by section 12, to dispose of the earth arising from making the drains, six feet from the verge of the slopes or batters, at an average or otherwise, as they shall think necessary; but they are also required to make and maintain such other cuts, drains, outlets, sluices, gowts, tunnels, and other works, as they shall think necessary, in the grounds in the East fen, &c. (comprising the lands adjoining to this cut.) By section 14, the several cuts, works, &c. before directed to be executed by the special commissioners, shall be done under the direction and control of the general commissioners, and shall, after the completion thereof, be vested in and for ever afterwards remain, continue, and be subject to the power, jurisdiction and sole control of the general commissioners, as if made, done and executed under the authority of the former act. By section 39, the special commissioners are to make an award, with a true plan annexed of the grounds to be drained. The 41st section gives the general commissioners the power to tax for the purposes of general drainage. From these clauses it appears that the special commissioners have special powers, which seem not to have been of a permanent nature, and which would be determined after the works were completed and the award made; and then the authority of the general commissioners of the drainage, under the 2 *Geo. 3*, c. 32, would alone be in force. But as the case does not enable us to say whether the powers of the special commissioners, if any, which remained after the drain was made, are yet in force, we must treat the question as if they were; though probably the general commissioners, by virtue of 2 *Geo. 3*, c. 32, enabling them to make works for the general purpose of drainage, would have the same power of making cuts, drains, and other works, as is given

to the special commissioners under the latter part of the 12th section. The general commissioners would unquestionably be entitled, and indeed bound, to cleanse the Hobhole Drain, when required, and remove the mud from it. The special commissioners, (and probably the general commissioners also,) would have the power, if necessary, for the purposes of the general drainage, to make smaller cuts, communicating with this, and drains, gowts, tunnels or other works, and might use the soil on which the bank is placed for this purpose. The question then is reduced to this; whether, upon the finding of the jury in this case, the public use of the bank as a road would interfere with the exercise of these powers. The case might and ought to have stated whether the operation of cleansing the drain would or would not have been impeded by the use of this road; but as it does find that the drain was constructed in the manner directed by the act, and the act requires six feet to be left between the verge of the slope and the bank, (which must have been for the purpose of allowing sufficient space for cleansing the drain,) I think we may reasonably conclude that the use of the top of the bank itself for the purpose of cleansing the drain, or of depositing the mud there, was unnecessary. With respect to the exercise of the other powers,—of making cuts communicating with this drain, through the bank in question, or other works necessary to the drainage, it is impossible not to see that such powers could no longer be exercised upon the space occupied by the road, if the public had an unqualified right of road there; and unless they had, this indictment cannot be supported. But I think that if it were quite clear that such works would never be required, the commissioners, whether special or general, might give the right to the public. The special commissioners certainly might have sold the land, or let it, or disposed of it for money, under section 35, if it was not necessary to be made use of for the purposes of this act; and I do not see why they might not also in the like case have given it up to the public as a public highway; inasmuch as it is by no means impossi-

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No dedication to the public of land as a highway, with a reservation of a right of making cuts through the land when wanted for the purposes of a drainage.

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ble that the general works of the drainage might receive a benefit; perhaps equal to the pecuniary advantage from a sale, by facilitating the carriage of materials and the transport of workmen necessary for the purposes of the drainage. As the public have enjoyed the road without interruption for twenty years and upwards, we must infer that no purpose of the drainage has yet required the construction of cuts, or other works, upon the part of the bank in question; and if in that time the ordinary purposes of the drainage have not required them, it is not too much to say that such works will not be required, and that the space is not now wanted for any purposes of this act. If this had been a special verdict, I should have thought that both these facts should have been found by the jury, and that a venire de novo would have been necessary; but upon a special case we are not so strictly bound (a); and I do not think we ought to put the parties to the expense of a new trial on that account. I am of opinion therefore upon this case that we may come to the conclusion that the dedication of this part of the bank to the use of the public, as a road, was not inconsistent with the purposes to which the commissioners, whether special or general, were bound by the act of parliament to apply it.

Second point:
Necessity of
adoption by
parish.

Upon the other two questions I never had any doubt. As to the second, I have always considered it as clear that the parish is at common law bound to repair all public highways; this being, by the common law, the mode by which each parish contributes its share towards the public burthen of repairing all highways, instead of all the public roads being repaired by one general tax. Hence, if a road be dedicated to the public, no parish can refuse to repair it. It must bear in that shape its share of the general burthen, and its inhabitants receive an equivalent; not in the use of that road in particular, but in the use of all the public roads in the realm. The absence of repair by the parish is indeed a strong circumstance in point of evidence

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(a) *Vide ante*, 423, note (b).

to prove that the road is not a public one; the fact of repair has a contrary effect; but the conduct of the parish in acquiescing or refusing its acquiescence, is in my opinion immaterial in every other point of view. The judgment of my brother *Bayley*, in the case of *Rex v. St. Benedict (a)*, was cited on the argument as an authority to the contrary; but with every respect for that very learned judge, I must say I cannot accede to the doctrine there laid down, and I am not aware that there is any authority in support of it.

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Upon the third question also I feel no doubt. The repair by the parish of the part in question, is undoubtedly a sufficient adoption, if adoption be necessary, which I am clearly of opinion it is not.

Third point:
Whether in
fact adopted.

Upon the whole, therefore, I am of opinion that the crown is entitled to our judgment.

LITLEDALE, J.—A great number of cases have been cited as to what shall be taken to be a dedication of land to the public, so as to establish a highway. I need not advert to these, because I agree in their authority; and I think if this land were not in the peculiar circumstances in which it is placed, there would be a sufficient dedication to make it a public highway. But the difficulty I have is, that the land over which the road lies has been appropriated, by 41 Geo. 3, cap. cxxxv., for the purposes of drainage. By that act certain powers are given to the commissioners, who are to deal with the land mentioned in the act in the manner there prescribed. Under these powers the commissioners have made a bank, which is subservient to the purposes of the drainage. Over a part of this bank the road in question extends. It is true that the bank has not, for a great number of years, been practically used to give any further protection or support to the works than it did when first made; and very probably it never may be wanted in any other state than it now is. But I cannot take judicial

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(a) 4 Barn. & Ald. 450.

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notice of that, and I cannot say but at some future time it may be wanted, for the works of the drainage, in such a manner as that it could not be used beneficially for these purposes if there were a common highway over it. And I think the commissioners had no power to dedicate to the use of the public, as a highway, land, with the ownership of which they were entrusted for a special purpose, and for which special purpose this land may, at some future period, be required: and as all the king's subjects are presumed to know acts of parliament, they must, when they used the road, be presumed to have known that in point of law it could not be so dedicated, and that it could only be used as a way of permission and sufferance; and they cannot be considered as having acquired a right by adverse enjoyment, but only by usurpation on rights which were designated by parliament, and which therefore could not be infringed upon. The adoption of the parish by repairing part of it, does not vary the case. The adoption of a parish is no more than the use of it by the public; the parish are merely a part of the public. If a road has been used by people in the parish, it furnishes evidence, pro tanto, of its being a way for the rest of the public; and if the parish have repaired it, that furnishes a strong inference that it is a public highway, as else they would not have been at that expense; but it only raises a strong *presumption*, and there is no *estoppel* against a parish in such a case. The adoption by the parish does not necessarily, as a matter of law, make a road public, nor does their refusal to adopt it prevent its being so; and if the general rule were so, still it would not be the case here, as parliament has already directed it to be under the control of commissioners, for parliamentary purposes. A public road has been made, by legal authority, in continuation of what is now contended to be a road; but that can make no difference as to the legality of this road. If the use of this as a public road be an object of great importance, the only way

to have it made a legal road, is by an application to parliament, who will exercise their discretion on the subject.

On the whole of the case, I am of opinion that judgment should be entered for the defendants.

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DENMAN, C. J.—The question raised by this case was, First point. whether the parish of Leake is bound to repair a road which runs along the top of a bank forty feet wide; in other words, whether this, which is unquestionably a road *de facto*, is also a road *de jure*. The bank was made in execution of certain works of drainage, done under an act of the 2d of *Geo. 3*, and another act of the 41st of *Geo. 3*; and it is stated as a fact that “the said bank has been used by all persons for twenty-five years as a public carriage road, without intermission, and is a very useful and convenient road to the public.” It is further stated, that part of the indicted part of the road was repaired by the parish of Leake ten years ago. All the terms in the definition of a public road are found in this statement. But it was argued that the bank in question cannot be a public road, because that would be inconsistent with the purposes of drainage, for which it was raised, and with the superintending power vested in the commissioners for drainage purposes. The words relied on are, that “all banks made (as this was) under the 41st *Geo. 3* (a), as well as the cuts, drains, dams, forelands, and other works,” should be made, done and executed under the direction and control, and to the satisfaction of such general commissioners, and should, after the completion thereof, be vested in and for ever afterwards remain, continue and be subject to the power, jurisdiction and sole control of the said general commissioners, or any five or more of them, in such and the like manner as if the same had been made, done and executed under the authority of the former act (b) above mentioned.” This recited act (b) refers in like manner to the provisions of a former

(a) Cap. cxxxv.

(b) 2 *Geo. 3*, c. 32.

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a public road. The land, after it was bought by the commissioners for the purposes of the act, was converted into a drain, and the commissioners may yet have occasion to make use of it. It is admitted that a user by the public of a road for twenty years, will make it a highway. But assuming that the commissioners could dedicate this road to the public, the user by the public is in this case explained.

The commissioners, however, had no power to dedicate this road, or to permit the public to use it. The land was purchased for the purposes of the act. The commissioners may have occasion to cleanse the drain, and it seems impossible that they could do so without obstructing the road during that operation. According to the argument for the crown, if they did do so, they might be indicted for a nuisance in obstructing the highway. If the cleansing of the drain would become indictable, the commissioners cannot effect the purposes of the act. The commissioners had power to widen and deepen the drain, and could not use the banks for this purpose without causing a partial obstruction of the road. If they could allow the public to use any part of the banks, they might allow them to use the whole of it; and if the whole is to be considered as a road, the commissioners could not perform their public duties without making themselves liable to an indictment. No case has been cited in which there has been a dedication by trustees of land, upon which they had some public duty to perform. In *The Trustees of the Rugby Charity v. Merryweather*, the trustees were considered as private individuals. *Rex v. Edmonton* was the case of a road actually set out by commissioners of inclosure. There, the churchwardens did not hold for any public purpose, but for the benefit of certain land-owners, and in fact represented private persons. No decided authorities have been found. Mr. *Starkie* says, that a question similar to this arose on the northern circuit. Where a party has the power to dedicate, and a consideration for it is shewn, it may be

presumed that a dedication took place, but there can be no presumption of a violation of a public duty (a).

Supposing the commissioners had a right of dedication, no jury would, under the circumstances, presume there had been an adoption in this case. In *Rex v. St. Benedict, Bayley*, J. says, "Admitting that in this case there was a dedication to the public, (which I think does not sufficiently appear,) and that the road was found to be a public benefit, (which I am not sure is the case,) I think that in consequence of the want of some act of acquiescence or adoption by the parish, they are not liable to the repair of this road." In *Rex v. Cumberworth* (b), Lord Tenterden says, "Here there was no act of acquiescence by the defendants; and according to *Rex v. St. Benedict* and *Rex v. Mellor*, some such act was necessary at all events to make them liable." In *Rex v. Cumberworth* therefore *Rex v. St. Benedict* is distinctly recognized. Here, there is not sufficient evidence of adoption by the parish of the part of the road indicted; it is only found that the parish, ten years ago, repaired a part of the road,

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Whitehurst, in reply. The power of purchasing the land at the side of the drains was given to the commissioners merely that they might have some place of deposit for the earth; and the act did not contemplate any further use of it. A space of six feet is left on each side of the drain; which is sufficient as a place of deposit. It is said that the commissioners might be considered as trespassers, if they obstructed the road. There can, however, be no objection to give the public a qualified right of way, subject to the right of the commissioners to cleanse the drain as occasion may require. The commissioners are empowered to enter upon any lands within the fen; they may therefore, for the purposes of the act, enter even on old highways. The argument

(a) See *Williams v. East India Company*, 3 East, 192; *Smith v. Huson*, 1 Phillimore, 287; *Calder v. Rutherford*, 3 Brod. & Bingh. 302; *Rex v. Hube, Peake*, N.P.C. 131; Mann. Dig. 2d ed. 143, title *Evidence*, pl. 341.

(b) 3 Barn. & Adol. 112.

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DOE, on the demise of JONES, v. WILLIAMS.

An entry to avoid a fine must be made *animo clamandi*; but it need not be accompanied with a declaration that the object of the entry is to avoid the fine.

In articles under seal, after a recital of an intended marriage between B. and C., A., (the father of B.) "for the support and settlement in the world of the young couple, freely and clearly giveth and settleth upon B. his lands from Michaelmas next," for life, remainder to the first son of the marriage, "and so on successively for every other son," with remainders over. This is a covenant to stand seised, and not an executory contract.

B. and C. have issue, E., their eldest, and F., their second son. B. dies; then E. dies. F. may enter, as in his remainder, and thereby avoid a fine with proclamations levied by E. and B.

EJECTMENT for land in Cardiganshire, tried before *Bosanquet*, J. at the last assizes for the county of Cardigan.


The lessor of the plaintiff, who is the second son of *Griffith Jones*, claimed under

"Articles of agreement (under seal (a)) made the 9th day of January, 1770, between *Abel Jones* of the first part, *Griffith Jones*, his son, of the second part, *Elizabeth Jonathan*, widow, and *John Jonathan*, her son, of the third part, and *Jane Jonathan*, spinster, daughter of the said *Elizabeth Jonathan*, of the fourth part;" which recited that a marriage was intended to be solemnized between *Griffith Jones* and *Jane Jonathan*, that a sum of money and furniture had been agreed to be given by *E. Jonathan* and *J. Jonathan*, and that *Abel Jones* was seised in fee; and continued as follows:—"And whereas it is also covenanted and agreed upon that the said *Abel Jones*, for the support and settlement in the world of the said young couple, freely and clearly giveth and settleth upon his said son *Griffith Jones*, (the premises,) with the appurtenances, from Michaelmas next (b), for his natural life; and after his decease, to the use of the first son of the body of the said *Griffith Jones*, on the body of the said *Jane Jonathan* lawfully to be begotten, and so on successively for every other son, the elder to take before the younger; and in default of such issue male, to the use of the daughter and daughters of the body of the said *Griffith*

(a) As to the necessity of a contract under seal to raise a use in consideration of blood only; see *Com. Dig. Covenant*, (G. 1) vide *Anon.* Dyer, 296 a; *Plowd.* 4; G. 2; *Cross v. Faustendich*, Cro. 308, 309, in *Sharington v. Stratton*; Jac. 180; *Roe v. Tranmer*, 2 Wils. ton; *Com. Dig. Covenant* (G. 1). 75; post, 605.

(b) That a covenant to stand seised at a future day is sufficient, see *Com. Dig. Covenant*, (G. 1) vide *Anon.* Dyer, 296 a; *Plowd.* 4; G. 2; *Cross v. Faustendich*, Cro. 308, 309, in *Sharington v. Stratton*; Jac. 180; *Roe v. Tranmer*, 2 Wils. ton; *Com. Dig. Covenant* (G. 1). 75; post, 605.

on the body of her the said *Jane* lawfully begotten or to be begotten. And if in case more than one child shall happen to be born, therefore the younger children, if more than one, are to be provided for according to their father's discretion, to think most competent to give them proportionable to his ability; and for want of such issue, to the use of his own right heirs for ever. The articles also contained a gift from *Abel Griffith* to his son of a sloop, and a declaration that if *Jane* survived her husband, she should enjoy the premises during life, as her jointure; and various clauses for refunding parts of the marriage portion in the event of the husband or wife dying within four or three years. The marriage between *Griffith Jones* and *Jane Jonathan* took effect. They are both dead, having left *John Jones*, their eldest son, the lessor of the plaintiff, their second son, and several younger children. *John Jones* is since dead. A fine, with proclamations, was levied by the father and the eldest son; under which the premises were ultimately conveyed to the defendant. For the plaintiff it was contended that the articles operated as a covenant to stand seised, &c.; that *Griffith Jones* and *John Jones* took under the articles only estates for life, and that the lessor of the plaintiff was now entitled to the estate as the next tenant for life. The defendant insisted that the articles were only executory, and that the legal estate, consequently, was not conveyed by it. In order to shew that there had been an entry to avoid the fine, it was proved, that in July the lessor of the plaintiff went on the premises and demanded possession, saying that it was his property; and he asked *Williams*, the defendant, if he would become his tenant. It was objected that this entry was insufficient to avoid the fine. The learned judge, without deciding on the validity of the objections, directed the jury to find a verdict for the plaintiff, and gave the defendant leave to move on both points to enter a nonsuit.

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Wilson, at the commencement of this term, moved accordingly. The entry was not sufficient. In a note to

First point :
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 cient.

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Clerke v. Pywell (a), in which the authorities are summed up, Mr. Serjt. Williams says—"A bare entry into the lands, without more, is not sufficient. He must also, at the time of entry, declare *quo animo* he entered, that it is to avoid all fines; otherwise it will not amount to a sufficient entry to avoid a fine."

Second point:
 No use raised.


The articles amount to nothing more than an executory contract. It was intended that some more formal instrument should be executed. Whatever effect might be given to this agreement in a Court of Equity, in a Court of Law it cannot of itself be of any force. There are no words of limitation. It was contended that this might amount to a covenant to stand seised; and it must be admitted that the consideration is sufficient: but upon a general view of the instrument, such a construction would defeat the object of the parties. To construe it as a covenant to stand seised, and consequently as having a legal, as distinguished from an equitable, operation, would defeat the intention; for supposing there were ten children of this marriage, every one of whom should leave issue, if this interest is to be considered as operating in a Court of Law, each of these children could only take a life estate; and on the death of the survivor of the ten, the ultimate limitation to the settlor's right heirs would take effect, under which the estate might be totally alienated from the issue of the marriage. But by denying it any operation in a Court of Law, and leaving it to be construed and acted on in equity, the intention of the parties may be effectuated; as a Court of Equity will consider it as merely heads or notes for a more formal instrument, which would be prepared under the direction of the Court, according to the rule upon which it has acted in limitations under the rule in *Shelley's case* (b). Thus, in *Fearne on Contingent Remainders* (c) it is said, "in the decreeing the execution of marriage articles, and in the construction of

(a) 1 Wms. Saund. 319 f. See
vide post, 606 (c).

(b) 1 Co. Rep. 93.
 (c) 8th edition, p. 90.

trust estates, of some descriptions at least, the Court of Chancery regards the end and consideration of the settlement, and the intent of the trust beyond the legal operation of the words in which the articles or the trusts are expressed."

But if this Court construe it as an actual conveyance, equity will probably decline to interfere, the parties having chosen to be their own conveyancers. [*Taunton*, J. The rule in *Shelley's case* (a) is not such a favourite in Courts of Equity as it is in Courts of Law.] This agreement was not to take effect until after the next Michaelmas. [*Taunton*, J. A covenant to stand seised need not be to take effect immediately (b). *Parke*, J. Have you examined the cases in Mr. Serjt. Williams's note?] Those cases certainly only shew that the entry must be made *animo clamandi*. [*Denman*, C.J. The Court wishes to be furnished with a copy of the instrument.]

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On a subsequent day in this term, the judgment (c) of the Court (d) was delivered by

DENMAN, C. J.—In this case the question was, whether the articles contained an executory contract or a covenant to stand seised. The words are, "giveth and settleth" his lands "from Michaelmas next;" and there is no agreement to execute another instrument (e). We think that this is a

Second point.

(a) As to this rule, see *Doe v. Martyn*, 2 Mann. & Ryl. 492 (c); *Doe d. Jones v. Davies*, ante, vol. i. 654.

(b) Com. Dig. title Covenant, (G: 1) (G: 2).

(c) This was not a written judgment.

(d) *Denman*, C. J., *Littledale*, *Parke*, and *Patteson*, JJ.

(e) As to the effect of such a clause, see *Goodtitle dem. Estwick*, v. *Way*, 1 T. R. 735; *Poole v.*

Bentley, 12 East, 168; 2 Campb. 286; *Tempest v. Rawling*, 13 East, 18; *Doe dem. Walker v. Groves*, 15 East, 244; *Morgan dem. Dowding v. Bissell*, 3 Taunt. 65; *Doe dem. Oldershaw v. Breach*, 6 Esp. N. P. C. 106; (the last of which cases was decided upon the supposed applicability of *Bromfield v. Smith*, 6 East, 530, and 2 Smith, 520.) *Fenny dem. Eastham v. Child*, 2 Maule & Selw. 255.

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ble that the general works of the drainage might receive a benefit, perhaps equal to the pecuniary advantage from a sale, by facilitating the carriage of materials and the transport of workmen necessary for the purposes of the drainage. As the public have enjoyed the road without interruption for twenty years and upwards, we must infer that no purpose of the drainage has *yet* required the construction of cuts, or other works, upon the part of the bank in question; and if in that time the ordinary purposes of the drainage have not required them, it is not too much to say that such works will not be required, and that the space is not now wanted for any purposes of this act. If this had been a special verdict, I should have thought that both these facts should have been found by the jury, and that a *venire de novo* would have been necessary; but upon a special case we are not so strictly bound (a); and I do not think we ought to put the parties to the expense of a new trial on that account. I am of opinion therefore upon this case that we may come to the conclusion that the dedication of this part of the bank to the use of the public, as a road, was not inconsistent with the purposes to which the commissioners, whether special or general, were bound by the act of parliament to apply it.

Second point:
 Necessity of
 adoption by
 parish.

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True principle of parochial liability.

(a) *Vide ante*, 423, note (b).

to prove that the road is not a public one; the fact of repair has a contrary effect; but the conduct of the parish in acquiescing or refusing its acquiescence, is in my opinion immaterial in every other point of view. The judgment of my brother *Bayley*, in the case of *Rex v. St. Benedict (a)*, was cited on the argument as an authority to the contrary; but with every respect for that very learned judge, I must say I cannot accede to the doctrine there laid down, and I am not aware that there is any authority in support of it.

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Upon the third question also I feel no doubt. The repair by the parish of the part in question, is undoubtedly a sufficient adoption, if adoption be necessary, which I am clearly of opinion it is not.

Third point:
Whether in
fact adopted.

Upon the whole, therefore, I am of opinion that the crown is entitled to our judgment.

LITLEDAL, J.—A great number of cases have been cited as to what shall be taken to be a dedication of land to the public, so as to establish a highway. I need not advert to these, because I agree in their authority; and I think if this land were not in the peculiar circumstances in which it is placed, there would be a sufficient dedication to make it a public highway. But the difficulty I have is, that the land over which the road lies has been appropriated, by 41 Geo. 3, cap. cxxxv., for the purposes of drainage. By that act certain powers are given to the commissioners, who are to deal with the land mentioned in the act in the manner there prescribed. Under these powers the commissioners have made a bank, which is subservient to the purposes of the drainage. Over a part of this bank the road in question extends. It is true that the bank has not, for a great number of years, been practically used to give any further protection or support to the works than it did when first made; and very probably it never may be wanted in any other state than it now is. But I cannot take judicial

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(a) 4 Barn. & Ald. 450.

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notice of that; and I cannot say but at some future time it may be wanted, for the works of the drainage, in such a manner as that it could not be used beneficially for these purposes if there were a common highway over it. And I think the commissioners had no power to dedicate to the use of the public, as a highway, land, with the ownership of which they were entrusted for a special purpose, and for which special purpose this land may, at some future period, be required: and as all the king's subjects are presumed to know acts of parliament, they must, when they used the road, be presumed to have known that in point of law it could not be so dedicated, and that it could only be used as a way of permission and sufferance; and they cannot be considered as having acquired a right by adverse enjoyment, but only by usurpation on rights which were designated by parliament, and which therefore could

Second point.. not be infringed upon. The adoption of the parish by repairing part of it, does not vary the case. The adoption of a parish is no more than the use of it by the public; the parish are merely a part of the public. If a road has been used by people in the parish, it furnishes evidence, pro tanto, of its being a way for the rest of the public; and if the parish have repaired it, that furnishes a strong inference that it is a public highway, as else they would not have been at that expense; but it only raises a strong *presumption*, and there is no *estoppel* against a parish in such a case. The adoption by the parish does not necessarily, as a matter of law, make a road public, nor does their refusal to

First point. adopt it prevent its being so; and if the general rule were so, still it would not be the case here, as parliament has already directed it to be under the control of commissioners, for parliamentary purposes. A public road has been made, by legal authority, in continuation of what is now contended to be a road; but that can make no difference as to the legality of *this* road. If the use of this as a public road be an object of great importance, the only way

to have it made a legal road, is by an application to parliament, who will exercise their discretion on the subject.

On the whole of the case, I am of opinion that judgment should be entered for the defendants.

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DENMAN, C. J.—The question raised by this case was, First point. whether the parish of Leake is bound to repair a road which runs along the top of a bank forty feet wide; in other words, whether this, which is unquestionably a road *de facto*, is also a road *de jure*. The bank was made in execution of certain works of drainage, done under an act of the 2d of *Geo. 3*, and another act of the 41st of *Geo. 3*; and it is stated as a fact that “the said bank has been used by all persons for twenty-five years as a public carriage road, without intermission, and is a very useful and convenient road to the public.” It is further stated, that part of the indicted part of the road was repaired by the parish of Leake ten years ago. All the terms in the definition of a public road are found in this statement. But it was argued that the bank in question cannot be a public road, because that would be inconsistent with the purposes of drainage, for which it was raised, and with the superintending power vested in the commissioners for drainage purposes. The words relied on are, that “all banks made (as this was) under the 41st *Geo. 3* (a), as well as the cuts, drains, dams, forelands, and other works,” should be made, done and executed under the direction and control, and to the satisfaction of such general commissioners, and should, after the completion thereof, be vested in and for ever afterwards remain, continue and be subject to the power, jurisdiction and sole control of the said general commissioners, or any five or more of them, in such and the like manner as if the same had been made, done and executed under the authority of the former act (b) above mentioned.” This recited act (b) refers in like manner to the provisions of a former

(a) Cap. cxxxv.

(b) 2 *Geo. 3*, c. 32.

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the ground that there was no privity of contract established between the plaintiffs and the defendants. His lordship refused to give leave to move to enter a verdict for the plaintiffs. In the following Hilary term, Sir James Scarlett obtained a rule nisi to set aside the nonsuit and for a new trial; against which, in Trinity term,

Campbell, S. G., F. Pollock and Hoggins, shewed cause. This case stands upon the same footing as that of *Sims v. Britten*. The defendants knew nothing of any others than Captain *Chas. B. Gribble*: the account was in his name alone, and he only was entitled to draw upon them in respect of any balance due upon it. It cannot be said that there was any breach of duty in *Chas. B. Gribble* in paying the money into the banking house in his own name; for it was done with the full knowledge and consent of the other part-owners; and therefore it was the same thing as if they had sent him the money and he had paid it into his own account. No privity whatever existed between the other part-owners and *Bond* and *Pattisall*; and therefore this action cannot be maintained. The only semblance of privity was that relating to the warrants of the East India Company, which cannot be obtained unless a receipt be given, signed by one or more of the other part-owners in addition to the ship's husband; but once obtained, it is well known that they are considered as cash and circulate as such. Therefore the circumstance of these warrants appearing to have been given for the freight of the *Princess Charlotte of Wales*, is not sufficient to establish privity between the other part-owners and any persons into whose hands the ship's husband may put them. [*Patteson, J.* How do you distinguish this from the case of a common partnership, where the name of one only appears, and he keeps a private account and a business account with his bankers? Would you contend that the secret partners could not recover from the bankers the balance of the business account?] This case is different from that of a secret

partnership. It is precisely the same as if *C. B. Gribble* had been no part-owner at all, but merely an agent to the owners of the ship: he is only to be regarded as the ship's husband, who perhaps need not be a part-owner. The bankers were here accountable to *C. B. Gribble* alone, and he to his co-part-owners. It was attempted to distinguish this case from that of *Sims v. Britten*, on the ground that that was a case of set-off; but that was not so. Indeed, the judgment of the Court could not proceed upon the ground of set-off, because the set-off was a debt which was certainly due from *C. B. Gribble* alone, and could not be set off against a debt due to him and the other part-owners. [*Parke, J.* That was not the ground of decision.] *Sims v. Britten* is indeed much stronger than this case; but there two accounts were kept; one in *C. B. Gribble's* own name, and the other in his name as "managing owner of the ship *Princess Charlotte*." In *Stephens v. Badcock (a)*, where the defendant, an attorney's clerk, authorized by his master, received money which the master was in the habit of receiving for the plaintiff, and gave a receipt for his master, it was held that there was no privity of contract between the plaintiff and the clerk, who received the money as the agent of the attorney, and was accountable to him only. [*Patteson, J.* My only doubt is, whether this is not money paid in by *C. B. Gribble* for himself and the other part-owners.] It is for the plaintiffs to make out clearly that the contract with the defendant was by *C. B. Gribble* and others, and not by *C. B. Gribble* alone. It is true that *C. B. Gribble* was liable to account for the moneys received by him on account of the ship, and to pay their respective proportions to the other part-owners, and that if *C. B. Gribble* were still alive, an action would lie against him at the suit of the plaintiffs; but it does not follow that the plaintiffs may sue the bankers of *C. B. Gribble*. The law does not allow *A.* to bring an action against *B.* merely because *A.* could sue

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(a) 3 Barn. & Adol. 354. And see ante, vol. i. 728.

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C., who could sue *B.*, which is what is now attempted. There is here no privity of contract raised by law, and none established in point of fact. Therefore the nonsuit was right. *Wedlake v. Hurley (a)*.

With regard to the other sum, which was paid in after the death of *C. B. Gribble*, it is clear that the person on whose account the money was paid in, who is the executor, is the only person entitled to call upon the defendants to pay it over.

Sir J. Scarlett, R. V. Richards, Follett, and F. Robinson, contra. This case is distinguishable from *Sims v. Britten*, and other cases. In *Sims v. Britten* there is no doubt that the defendant might, independently of the general principle, claim his set-off. It is said that there could not have been a set-off in that case if the money due from the defendants on the one account was the money of *C. B. Gribble* and his co-part-owners, and that due to them was due to them from *C. B. Gribble* alone. But the contrary to this has been established in two sets of cases, viz. in cases where an undisclosed principal sues upon the contract made by and in the name of his agent, and where secret partners join with the known contractor in an action upon a contract made ostensibly by him alone. In the former cases, the principal, giving notice that he is such, is entitled to sue upon the contract; and in the latter, the secret partners are entitled to join; but in both the defendants may set off debts due from them to the agent or the open partner only. Upon this ground alone, independently of the question as to the plaintiff's privity, the case of *Sims v. Britten* was rightly decided. [*Parke, J.* It certainly was not decided upon the ground you mention, but upon the ground that the contract was by *C. B. Gribble* alone. Whether rightly decided or not is another question.] Now in this case it is submitted that the plaintiffs are entitled to sue: and, first, it may be premised, that though the action is ostensibly

(a) 1 Crompt. & Jervis, 83.

against the bankers, yet in the Court of Chancery, by whom this action was directed to be tried, the question is between the plaintiffs and the executor of *C. B. Gribble*, and it is they, and not the bankers, who are now the real defendants. It is therefore clear that justice will be done by allowing the plaintiffs to recover in this action. Upon the face of the warrants it appeared that they were orders to pay money to the owners of the ship generally, for freight. Suppose the two warrants being given, *C. B. Gribble* had paid them into the defendants' bank, and the plaintiffs had given notice to the defendants that they were jointly interested in the warrants, an action of trover might have been brought by the plaintiffs against the defendants to recover the warrants. The form of the warrants was notice to the bankers that *C. B. Gribble* was not individually entitled to the whole proceeds. Then if such an action would have lain to recover the warrants themselves, does the circumstance of their being converted into money materially alter the rights and liabilities of the parties? The authorities shew that it cannot. *Taylor and another, assignees of Walsh, v. Sir Thomas Phumer (a)*, where it was held that "the produce of or substitute for the thing, still follows the nature of the thing itself, as long as it can be ascertained to be such." In an old case it was decided, that where a factor had money of his principal and invested it in goods, the principal could recover the goods. It is not correct to call this a banking account kept by *C. B. Gribble* with the defendants. It was the produce of two warrants paid at one time, those warrants appearing to be the joint property of many, entrusted to one; and it would seem that all the cheques operating upon this fund, except those in favour of the son of *C. B. Gribble*, the amount of which was to be returned by him into the same fund, were for disbursements in respect of the ship. If other money of *C. B. Gribble* had been mixed up with the produce of these warrants, the case might have been somewhat different. Suppose that instead of paying

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(a) 3 Maule & Selw. 562.

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the warrants into the bankers' hands, he had himself received the produce, and kept it separately in a chest by itself, and had died, would his executors have been entitled to retain it as against the co-part owners? In *Howard v. Jemmett* (a) Lord Mansfield said, "If an executor becomes bankrupt, the commissioners cannot seize the specific effects of his testator; nor even in money, which specifically can be distinguished and ascertained to belong to such testator, and not to the bankrupt himself." There is no difference in principle between money kept separately in a trunk or bag, or put into the hands of a banker, no other money being mixed with it. It is the money of the partners, and if they have allowed one person to have the dealing with it, the only consequence is, that they will be bound to secure third parties from sustaining injury through the exercise of the power given to such person. The money forming a specific fund in the hands of the bankers may be followed into their hands and recovered from them, provided that such persons could not sustain an injury by its being so followed. An action might undoubtedly have been maintained by the joint owners, and C. B. Gribble, in his life-time, against the bankers. How then does this case differ from the case of a secret partner, supposing that the contract cannot be said to have been made in fact by the owners jointly? There is privity in fact, or at all events a privity in interest. The undisclosed principal has no privity in fact with the purchaser, who buys from the agent, and yet he is allowed to sue upon the contract. Why? because he has privity in interest. It is sufficient if a contract with the party can be inferred from his privity in interest, nor is it necessary to go back to the original paying in of the money; if there has been notice since, as there has been here, the persons jointly interested are entitled to sue. After notice, the bankers could no longer say that it was the contract of Gribble alone, though they hold it subject to equities in third parties. After notice they must treat it as having been made by Gribble, for

the benefit of all the joint owners. *Garrett and another v. Handley* (d), *Garrett v. Handley* (b), *Skinner v. Stocks* (c), *Dixon v. Hammond* (d), *Roberts v. Ogilby* (e), *Kitchen v. Campbell* (f), *Adams v. Claxton* (g), *Ex parte Bouchier* (h), *Campbell v. Clerk* (i). And *Stephens v. Badcock* (k) is no authority for the defendant, because there the ground of the decision was, that the person against whom the action was brought was nothing more than the mere hand through which the money was received by the attorney, and that therefore privity could not be inferred between the plaintiff and the defendant.

With regard to the sum of 3478*l.*, the loan of it by the father to the son was a breach of trust on the part of the former. But the loan was made upon condition that the amount should be restored into the same fund. The money was repaid by the son, and it was placed by the bankers to the wrong account.

Cur. adv. vult.

DENMAN, C. J., in the course of Trinity term, delivered the judgment of the Court.

This was an action brought by the plaintiffs, surviving joint and part-owners of the "Princess Charlotte," to recover from the defendants, bankers in London, 1750*l.*, the balance of a banking account kept in the name of C. B. Gribble, a part-owner and ship's husband, and 3478*l.* 3*s.* 8*d.* appearing due from them in an account with John Gribble, his executor. It was proved at the trial that C. B. Gribble as ship's husband was permitted by the owners to have the possession of two warrants for the freight of the vessel payable by the East India Company; which warrants had

First point.

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| (a) 4 Dowd. & Ryd. 144, 4 Barn. | (e) 9 Price, 269. |
| & Cressw. 464. | (f) 3 Wils. 304. |
| (b) 5 Dowd. & Ryd. 319, 3 Barn. | (g) 6 Vesey, 226. |
| & Cressw. 462. | (h) Ambler, 218. |
| (c) 4 Barn. & Ald. 437. | (i) 3 P. Wms. 156. |
| (d) 2 Barn. & Ald. 310. | (k) Ante, 611. |

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been given by the Company on a receipt being signed by C. B. Gribble and another of the owners. These two warrants, C. B. Gribble put into the hands of the defendants in order that they might receive the money, and place it to his credit in an account opened in his name in the defendants' books. This was done; and on C. B. Gribble's death the first-mentioned balance appeared due upon it to him; afterwards John Gribble opened a new account as executor, to the credit of which, 3478*l.* which had been lent by C. B. Gribble to his son Henry, out of the money due to C. B. Gribble on the account kept in his name, was repaid by Henry Gribble after his father's death. Upon the trial I nonsuited the plaintiffs, on the ground that there was no privity of contract between them and the defendants; and we all think that the nonsuit was right. Sums which are paid to the credit of a customer, with a banker, though usually called *deposits*, are in truth *loans* by the customer to the banker; *Carr v. Carr*(a), *Devaynes v. Noble*(b); and plaintiffs who seek to recover the balance of such an account, must prove that the loans were made *by them*. It is a well-established rule of law, that where a contract, not under seal, is made with an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party. This rule is most frequently acted upon in sales by factors, agents, or partners, in which cases *either* the nominal or real contractors may sue, but it may equally be applied to other cases; and we do not say that where a person lends money nominally on his own account, but really on account of and as the loan of another, the real lender may not sue for the money. But where money is lent by another in his own name, the plaintiff who alleges that *he, the plaintiff*, was in reality the lender, must

(a) 2 Merivale, 541.

(b) Ibid. 569.

prove that fact distinctly and clearly. He must show that the loan, though nominally that of another, was really intended to be his own. It was incumbent therefore in this case upon the plaintiffs to prove that when *C. B. Gribble* lent the proceeds of the freight warrants to the defendants, and had them placed to his credit in an account kept in his own name, he was acting in that respect as the agent of the plaintiffs as well as on his own account, and really lending the money to the defendants on the plaintiffs' account as well as his own. In this the plaintiffs certainly failed. They only showed that the warrants were, at the time they were placed in the hands of *C. B. Gribble*, their property; which is quite consistent with the supposition that the loan of the proceeds to the defendants was *C. B. Gribble's* loan. And indeed it would be very difficult for the plaintiffs to prove that they were the real lenders; for if they had intended to be so, it is natural to suppose that they would have taken care to raise the account in the defendants' books in their own names, or in the name of the "Owners of the ship *Princess Charlotte*."

With respect to the larger sum of 3478*l.* it is quite clear that this was paid to the bankers as the money of *John Gribble* the executor, being a repayment to him of a loan to the like amount by the testator *C. B. Gribble* to his son *Henry*. It therefore was a loan by the executor; and the executor only can sue the defendants for this amount in a Court of Law. Second point.

We therefore think that the rule which has been obtained to set aside the nonsuit should be discharged.

Rule discharged (a).

(a) And see *Brown v. Duncan*, 10 Barn. & Cresw. 93.
5 Mann. & Ryd. 144, 117; 8. C.

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Where a relator has twice obtained rules nisi for informations in the nature of a quo warranto, calling upon a party to shew why he exercised the office of mayor of a borough, which rules have been discharged upon cause shewn, the Court will not allow the same relator, on an application against the succeeding mayor, to raise the same questions as to the title of the former mayor to exercise the office.

REX vs. LANGHORN
FOLLETT, in last Easter term, obtained a rule nisi calling upon Mr. *Langhorn* to shew cause why an information in the nature of a quo warranto should not be exhibited, requiring him to shew by what authority he exercised the office of mayor of the borough of Berwick upon Tweed, from the 29th Sept. 1831, to the 28th Sept. 1832. Five grounds were stated on the rule, of which the first three were as follows. First, that there was not a good presiding officer at the meeting at which *Langhorn* was elected mayor. Second, that the presiding officer was not a legal mayor, he not being a resident within the borough, paying scot and lot, and participating in the assessments and burthens with the rest of the burgesses, at the time of his election. Third, that *Langhorn* was not a good burgess, inasmuch as there was no corporate meeting duly convened at which he was elected or admitted a burgess, and there was no good presiding officer at the meeting at which his supposed election as burgess took place. It appeared upon affidavits filed, that at the several meetings at which *Langhorn* had been elected a burgess and subsequently mayor, *Orde* presided as mayor; that during the mayoralty of *Orde* an application had been made to this Court on behalf of *Thompkins* the present relator, calling upon *Orde* to shew by what authority he exercised the office of Mayor of Berwick; that the Court granted a rule nisi for an information in the nature of a quo warranto, which upon cause shewn the Court discharged; that in the next term a second rule was obtained on behalf of *Thompkins*; and that upon cause shewn the Court said that they ought not to have granted the rule, and having discharged it, refused to give costs, on the ground that they had acted improvidently in granting the rule. The grounds alleged in the rules against *Orde*, were the same as those now alleged on the second ground in the present rule.

Campbell, S. G. and Ingham, in shewing cause, objected that the relator could not now indirectly raise the question as to whether *Orde* was a good mayor, as he had attempted to do in each of the three grounds above stated, it being quite clear that he could not do it directly after what had taken place; and for this *Wharton's* case (a) was cited.

Follett and Wilcock, contra, contended that *Thompkins*, as one of the public, was entitled to complain if he thought himself aggrieved by the election of *Langhorn*.

The Court, however, observed that the relator had twice before complained of the same matter, and refused to make the rule absolute with reference to the objection that *Orde* was not a good mayor.

It being further objected that at the election of *Langhorn* as a burgess there was no corporate meeting duly convened, because due notice had not been given of the meeting, the Court, on the question of want of due notice, made the rule absolute.

Rule absolute.

(a) Not reported.

DOE dem. JOHN ANDREW GALLINI v. FRANCIS

ALBERT GALLINI.

Same v. ARTHUR GALLINI.

EJECTMENTS on two demises, and two onsters, on 2d April, 1824, and 17th May, 1839, for the manors of Yattendon, Everington, Hampstead, Norreys, and Bothamptstead, and other lands in the county of Berks.

That construction of a will is to be preferred which, consistently with the rules

of law, gives effect to the greatest part of it. Technical words, or words of known legal import, in a will, must have their legal effect, even though the testator use inconsistent words, unless the inconsistent words be such as to prove that the technical words are not used in their proper sense.

The doctrine that a general intent is to be preferred to a particular intent manifested in a will, is incorrect and vague.

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At the trial before *Bosanquet J.*, at the Summer assizes for the county of Berks, in 1832, a special verdict (a) was found in each cause, stating the following facts:

Sir John Andrew Gallini, knight, being seised of the manors and other hereditaments, one fifth whereof is sought to be recovered in this action, by his will bearing date 19th October, 1799, devised to certain trustees and their heirs, all his manors, lands, &c. in Berkshire, also two houses in Hanover Square, Middlesex, with the coach-houses &c., and also certain estates in France situate in the *Departement du Pas de Calais*: to hold to them and their heirs, to the uses, upon the trusts, and for the intents and purposes thereafter mentioned, (that is to say); as for and concerning his manors &c. in Berkshire, upon trust to permit and suffer his son *Francis* to receive and take the rents, issues, and profits (except the timber), for life, subject to payment thereof and providing for the maintenance of the testator's wife during her life. And as to one of the houses in Hanover Square, upon trust to permit his daughter *Jesse* to receive and take the rents and profits thereof during her life. And as to the other house in Hanover Square, upon trust to permit and suffer his daughter *Louise* to receive and take the rents and profits during her life. And as to the estates in France, in trust to permit and suffer the testator's son *John* to receive and take the rents and profits thereof during his life, subject to the interest on the mortgage thereof. And from and after the determination of the several and respective estates of his said sons and daughters, of and in the said manors, tenements, &c. in England, and estates in France, the testator gave and devised the same estates unto the said trustees and their heirs during the several lives of his said children, in trust to preserve contingent remainders, but nevertheless to permit his sons and daughters to receive the said rents (except in cases of forfeiture thereafter declared). And

(a) The verdicts being the same, both cases were appointed to be argued at the same time.

upon the death of any of his said children, *Francois, Jese, Louise, and John*, or in case of such forfeiture, the testator gave and devised the estate or estates to him, her, or them respectively limited for life as aforesaid, unto and among all and every his, her, or their child or children lawfully begotten, which should be living at the time of his or her decease, or born in due time afterwards, for and during their natural lives, as tenants in common and not as joint tenants; but nevertheless with an equal benefit of survivorship among the rest of the said children, if more than one and any of them should die without leaving issue; the child or children of each of his said sons and daughters, taking the rents and profits of his, her, or their parents' estate or estates only. And from and after the decease of all and every the children of each of his said sons and daughters without issue, the testator devised the estate or estates to them respectively limited as aforesaid, unto and among all and every the lawful issue of such child or children during their lives, as tenants in common, and to descend in like manner to the issue of his said sons and daughters respectively, so long as there should be any stock or offspring remaining; and for default or in failure of any of his said sons and daughters, the testator gave and devised the estate or estates so limited to him, her, or them *dying without issue*, unto the survivors of his said sons and daughters, during their respective natural lives, in equal shares, as tenants in common, subject to the forfeiture thereafter declared; and after their respective deaths, the testator devised the same to the children of the survivors of his said sons and daughters, during their respective lives, as tenants in common, with such benefit of survivorship as aforesaid. And after the decease of all of them, to the issue of such children in like manner as he had before devised the original estate of each of his said sons and daughters. And for default or in failure of issue of all his sons and daughters, except one, the testator gave and devised all his freehold estates unto his only surviving son or daughter, and his or her heirs and assigns. Proviso: that

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the testator's sons or daughters, or their issue, should have no power to sell, assign, release, or convey their respective interests, or to grant annuities or yearly rents-charge, payable out of the testator's freehold estates, upon pain of forfeiture. Proviso: giving the testator's sons and daughters the power of granting leases for twenty-one years, upon the terms therein declared. Devise to the trustees, of the timber, upon the trusts therein expressed.

5th January, 1805, testator died, leaving the following issue, *Francis, Jesse, and Louise*. His son *John* and his wife died in the testator's lifetime.

At the time of the testator's decease, there was lawful issue of the said *Francis Gallini* then living, as follows; *J. A. Gallini*, (the lessor of the plaintiff,) his eldest son, *Mary, Arthur, and Frances A. P. H. Gallini*.

Trinity term, 1807. Upon an issue directed by the Court of Chancery of *devisavit vel non*, a verdict was found in favour of the will.

Aug. 1810. By a decree of the Court of Chancery, it was declared that the will ought to be established.

19th May, 1815. *Francis Gallini* died intestate, leaving issue the lessor of the plaintiff, *Mary, and Arthur Gallini*, (the defendant in one of the actions of ejectment,) and *Francis Albert Gallini*, (the defendant in the other action of ejectment,) who have all attained the age of twenty-one years. *Frances A. P. H. Gallini* died young, during her father's lifetime.

Jesse and Louise Gallini are both living, unmarried and without issue:

The premises comprised in the declaration in ejectment are the premises in the county of Berks devised by the will of Sir *J. A. Gallini*.

Francis Gallini, the eldest son of Sir *J. A. Gallini*, was in possession of the said estates in Berkshire, and in receipt of the rents, issues, and profits thereof, under and by virtue of the said will, at the time of his decease.

The lessor of the plaintiff is heir at law as well of *Francis Gallini*, as of the said testator, and is also

heir of the body of *Frances Gallini*, and attained the full age of twenty-one on the 13th May, 1822, when, under an order of the Court of Chancery, he was put into and has ever since been in possession and in the receipt of the rents and profits of one undivided fifth part of the said estates.

Under another order of the said Court, the defendant was, on his attaining the age of twenty-one years, namely, on the 17th Jan. 1827, put in possession and in receipt of the rents and profits of one other undivided sixth part of the said estates, claiming to be entitled thereto under the said will, and still is in possession of the same. The premises sought to be recovered in this ejectment are the one undivided fifth part of the said estates, in the county of Berks, so in possession of the said defendant, and such possession by the said defendant has been and is adverse to the lessor of the plaintiff (a).

14th May, 1832. The lessor of the plaintiff made an actual entry upon all the premises in Berkshire devised by the said will, one fifth part of which is sought to be recovered by this ejectment, (i. e. in each action), for the purpose of avoiding any fine, or fines which might have been levied of the said premises, or any part thereof (b).

This case was argued in last Trinity term.

Lynch, for the plaintiff. The object of the testator, when he made his will, was twofold: First, that his estates should devolve to his descendants from generation to generation, which may be termed his legal intention: and, Secondly, that his estates should devolve in a particular manner, that is, that his descendants should, from generation to generation, take only estates for life. This may be termed his illegal intention. It is submitted on the part of the plaintiff, that the sons and daughters of the testator took estates tail in their respective shares. On the other hand, the de-

(a) And now see 3 & 4 Will. 4, (b) See *Doe v. Williams & Jones*, 22 Bar. and 11 Ad. 21. *Williams v. Jones*, 100; *Doe*, 100; 65 P. 1.

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testator will contend that they took only estates for life. This latter position is not in accordance with the legal intention of the testator. In *Doe v. Applin* (a) it was held, that in order to give an effect to the devisors' general intent, the Court will overlook a particular intent inconsistent therewith; and in that case it was said by *Grose, J.*, that there was no case in which issue had been determined to be a word of purchase, unless coupled with other words expressing such an intent. In *Jesson v. Doe d. Wright* (b) it was said by Lord *Eldon, C.* "It is definitively settled as a rule of law, that where there is a particular and a general or paramount intent the latter shall prevail, and Courts are bound to give effect to the paramount intent." In *Doe d. Wright v. Jesson* (c) the devise was to *William* for life, and after his decease unto the heirs of the body of *William* lawfully issuing, in such shares and proportions as *William*, by deed or will, shall appoint; and in default thereof to the heirs of the body of *William*, lawfully issuing, share and share alike, as tenants in common; and if but one child the whole to such only child, and for want of such issue, to my right heirs for ever: the Court of King's Bench held, that *William* and his children, who were born after the death of the devisor, took estates for life only; but this decision was reversed in the House of Lords. In *Doe v. Smith* (d), the particular, was sacrificed to carry into effect the general, intent of the testator: *Wood v. Baron* (e), *Frank v. Stovin* (f), *Pierson v. Vickers* (g), *Bennett v. The Earl of Tankerville* (h), *Doe d. Bosnall v. Harvey* (i), established the same principle. In the last case *Abbott, C. J.*, says, (k) "It appears to be clearly established by the authorities which have been cited, that a particular intent, expressed in a will,

(a) 4 T. R. 82.

(b) 1 Bligh, 51.

(c) 5 Maule & Selw. 95.

(d) 7 T. R. 531.

(e) 1 East, 259.

(f) 3 East, 548.

(g) 5 East, 548; 2 Smith, 160.

(h) 19 Ves. 170.

(i) 4 Barn. & Cressw. 610. S. C. per nomen *Doe d. Bagnall v. Harvey*, 7 Dowl. & Ryl. 78.

(k) 4 Barn. & Cressw. 620.

must give way to a general intent." Nothing can be more striking than the different dispositions of the devises in the several cases which have been cited; and on the other hand, nothing can be more striking than the uniformity of the decisions. This circumstance can only have arisen from a close adherence to the rule which is now contended for.

The paramount intention is, that all the issue shall take. The testator, after giving life estates to his four children, directs, that upon the death of any of them, the parent's estate shall go to his or her children for life, with benefit of survivorship amongst those children, and after the decease of all the children of the testator, *without issue*, the devise is to the *issue* of such child during their lives, as tenants in common, and to descend in like manner to the issue of his said sons and daughters respectively, so long as there shall be any stock or offspring of his said sons and daughters. Suppose one of the children of the testator had died during the life of the devisor, leaving issue, such issue would be disinherited if it be held that the children of the testator take only estates for life. There is no devise to the grandchildren not coupled with a devise to the children. The devise to the grandchildren is a gift to them as a class, and therefore the devise would include grandchildren not alive at the testator's decease; *Jee v. Audley* (a), *Leake v. Robinson* (b).

This case is not distinguishable from *Murthwaite v. Jenkinson* (c), or *Wollen v. Andrewes* (d). *Mortimer v. West* (e) is the last decided case on this subject, and is in accordance with those which have been cited.

Talfourd, Serjt., for the defendant, *A. Gallini*. If the children of the testator did not take estates tail, the defendant will be entitled to succeed. It is submitted on the part of this defendant, that the children of *Francis, Jesse,*

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(a) 1 Cox, 324.

(b) 2 Meriv. 363.

(c) 3 Dowl. & Ryl. 764; 2 Barn.

& Cressw. 357.

(d) 2 Bingh. 126; 9 B. Moore, 248.

(e) 2 Sim. 274.

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Louise, and *John*, took estates for life, and their children took estates-tail, remainder to *Francis*, *Jesse*, *Louise*, and *John*, in tail. The testator gives a life estate to each of his children, then in terms he gives to his grandchildren a life estate in their parents' share, but as that estate is not to go over until each grandchild die without issue, the grandchildren have estates-tail; and the difficulty arises from the next provision, "and from and after the decease of all the children of *each* of my said sons and daughters, without issue, I give and devise the estate or estates to them respectively limited as aforesaid, unto and amongst all the lawful issue of such child or children during their lives. If "each" be construed to mean "every one," the testator's intention was manifestly absurd,—to make provision for his family when it was extinct. The sentence may be read thus: "from and after the decease of such of the children of my said sons and daughters as shall have issue." Looking at the whole scope of the will, the term dying *without issue*, when applied to the children of the testator, must mean dying *without such issue as aforesaid*. From *Ginger d. White v. White (a)*, and *Blackburn v. Edgley (b)*, it appears that the words "without issue," may mean "without such issue." In *Morse v. Lord Ormonde (c)*, the words "failure of issue," were construed to mean "failure of *such* issue." The testator's intention will be carried into effect by giving the parents remainders in tail, after the estate-tail in the grandchildren. By this means the predominant intention, that all the issue should take, will be fully carried into effect, *Doe d. Blandford v. Appton*, per *Grose, J. (d)*. "Issue," is here a word of purchase. *King v. Melling (e)*, shews that "issue" may mean "children," and be a word of purchase.

Murthwaite v. Jenkinson, and *Mortimer v. West*, proceeded upon the difficulty of giving two different meanings

(a) *Willes*, 348.


(d) 4 T. R. 88.

(b) 1 P. Wms. 605.

(e) 1 Vent. 225.

(c) 1 Russ. 382; 5 Madd. 115.

to the same word in the same will: *Cook v. Cook* (a), *Goodtitle v. Billington* (b). It is suggested that the testator intended that his posterity should take estates-tail from generation to generation. But it is remarkable that the trustees to preserve contingent remainder are appointed during the life estate of the *children*, and not afterwards. It yet remains to be decided, that where the testator intends to make an illegal disposition of his property, the Court will endeavour to carry his intention into effect. In *Wollen v. Andrewes* there certainly was not the word "children;" but there the Court was obliged to give effect to the whole intention, or put aside the will altogether, except so far as the life estates were concerned. All that is required here is to remove the estate-tail a generation lower. It is not intended to question the authority of *Mortimer v. West* (c), *Murthwaite v. Jenkinson*, or *Doe d. Jesson v. Wright*. The right rule on this subject was laid down in the last case by Lord *Redesdale*.

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Coote, for the defendant *F. A. Gallini*. The question is, in what manner that rule of law which relates to the general and particular intention of testators is to be understood. The effect of the rule, as it is construed by the plaintiff, is to frustrate the wishes and intention of the testator. But the rule is, not that the particular intent shall be sacrificed to the general intent, but that the general intent shall be carried into effect, regard being had to the particular intent, so far as it is consistent with the rules of law. In *Doe d. Bean v. Halley* (d), a construction was put upon the will in conformity with this definition of the rule. In that case observations fell from Lord *Kenyon*, C. J., (who may be considered the author of the rule,) shewing that he understood the rule in this way. That case resembles this in several particulars. There, the devise extended to a *particular* class of persons. Here, the limitation is to all the issue

(a) 2 Vern. 545.

(b) 2 Dougl. 753.

(c) 2 Sim. 274.

(d) 8 T. R. 5.

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of the children of the testator *living at the time of the decease of their parents*. The rule as laid down in *Doe v. Halley* is illustrated by *Parr v. Swindels* (a). In the latter case it was attempted to make "children" a word of purchase. But in that case, and in *Doe v. Halley*, the Court more fully carried into effect the object of the testator by giving the parent a *remainder* in tail; and not a *present estate-tail*. It is proposed to construe the will as if the words "without issue;" were "without *leaving* issue." The Court will not alter the language of the will, unless for the purpose of carrying into effect the clear intention of the testator. The object of the proposed alteration is to give effect to limitations which are too remote, and contrary to the policy of the law. In *Chapman v. Brown* (b), Lord Mansfield says, "A Court of Justice may *construe* a will; and, from what is expressed, necessarily *imply* an intent not particularly specified in words; but we cannot, from arbitrary conjecture, though founded upon the highest degree of probability, *add* to a will or *supply the omissions*." If the will is allowed to stand, the grandchildren must take an estate-tail, since the testator's general intent was that the grandchildren should take *by purchase*. That the grandchildren take an estate-tail, has been sufficiently shewn by Serjt. Talfourd. The object of the rule, as to general and particular intent, is to give to all persons interested a chance of having the property, but if an estate-tail be given to the parents, they may destroy the entail and prevent its devolution to the issue. At all events the grandchildren have estates for life by implication, *Beumett v. Lowe* (c), *Hayes v. Hayes* (d), *Beard v. Westcott* (e), *Mortimer v. West* (f).

Lynch, in reply. *Parr v. Swindels* is very distinguishable from this case. But if it be not, it is at variance with the ultimate decision in *Doe d. Jesson v. Wright*,

(a) 4 Russell, 283.

(b) 3 Burr. 1626.

(c) 7 Bingh. 535; 5 M. & P. 485.

(d) 4 Russell, 311.

(e) 5 Taunt. 393.

(f) 2 Sim. 274.

in the House of Lords. In *Doe v. Halley*, an estate of inheritance was conferred upon the eldest son. Here, no estate of inheritance is given to the issue, it is in terms given to them for life. Besides, in *Doe v. Halley*, the testator intended to create a family, and gave the estate upon condition that his name was taken by the possessor. It is contended that an estate for life is given to the children of the testator, remainder in tail to the issue of the children, remainder in tail to the parents; and it is said that the devise extended only to the issue of such children as were alive at the death of the testator. It was not the intention of the testator that the issue of any children dying in his life-time should be excluded from his bounty. [*Parke, J.* According to the construction contended for, if *Francis* the eldest son had died in the life-time of his father, his children would have taken nothing.] That would have been the case. There are evils attendant upon both constructions, and the Court must choose between the two. *Moss v. Lord Tankerville* is not applicable. The Court of necessity there presumed that the word "estate-tail" must, under the circumstances appearing in the will, have meant tail male. The Court is not asked to alter the will, or to add to it. It is merely submitted that there is an inconsistency in the will. There is no more reason for saying the grandchildren should have an estate-tail, than the children. The testator, in terms, gives the children and the grandchildren estates for life. Here, in default of the issue of any of the sons and daughters, except one, the estate is given to that one. This limitation gives the children an estate-tail. The true construction (and the only construction which will carry into effect the intention of the testator) is, that the children of the testator should have an estate-tail.

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Cur. adv. vult.

DENMAN, C. J., in Michaelmas term, 1833, delivered the

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judgment of the Court. The question in this case arises upon the will of Sir *John Andrew Gallini*, who devised his estates in the county of Berks, for an undivided fifth part of which this ejectment was brought, to trustees, in trust to permit and suffer his eldest son, *Francis*, to receive and take the rents for his natural life; a house to each of his two daughters, *Jesse* and *Louise*; and an estate in France to his son *John*, to each for life in like manner. The will then contains a clause devising all the estates to trustees to preserve contingent remainders, and in the meantime to permit his sons and daughters to enjoy for life, and proceeds (passing over the clause relating to forfeiture, which appears to be immaterial) in the following words:—
“ And from and immediately after the decease of any or either of my said children, *Francis*, *Jesse*, *Louise* and *John*, I give and devise the estate or estates to him, her or them, respectively limited for life as aforesaid, unto and among all and every his, her or their child or children lawfully begotten which shall be living at the time of his, her or their decease, or born in due time afterwards, for and during their natural lives, as tenants in common and not as joint tenants; but nevertheless with an equal benefit of survivorship among the rest of the said children, if more than one, and any of them, shall die without leaving issue, the child or children of each of my said sons and daughters taking the rents and profits of his, her or their parent's estate or estates only; and from and after the decease of all the children of each of my said sons and daughters *without issue*, I give and devise the estate or estates to them, respectively limited as aforesaid, unto and among all and every the lawful issue of such child or children during their lives as tenants in common, and to descend in like manner to the issue of my said sons and daughters respectively, so long as there shall be any stock or offspring remaining; and for default or in failure of issue of any of my said sons and daughters, I give and devise the estate or estates, *so limited to him, her*

or them dying without issue, unto the survivors of my said sons and daughters, during their respective natural lives, in equal shares, as tenants in common, subject to the forfeiture hereinafter declared; and after their respective deaths, I give and devise the same to the children of the survivors of my said sons and daughters, during their respective lives, as tenants in common, with such benefit of survivorship as aforesaid; and after the decease of all of them, to the issue of such children, in like manner as I have before devised the original estate of each of my said sons and daughters; and *for default or in failure of issue of all my said sons and daughters except one*, I give and devise all my said freehold estates unto my only surviving son or daughter, to hold to him or her and his and her heirs and assigns for ever."

The testator died 5th of January, 1805, leaving three children, *Francis*, *Jesse* and *Louise*.

Francis had then four children: one of these died. *Francis*, the son, afterwards died, leaving five children, four sons and one daughter, the lessor of the plaintiff being the eldest, and the defendant another.

In this ejectment the plaintiff cannot succeed, unless he establishes that *Francis*, the eldest son, took an estate-tail in the whole of the Berkshire property, in which case that estate-tail would have descended on him, as the eldest son and heir of the body of *Francis*. If the defendant and the other brothers and sisters of the lessor of the plaintiff took estates for life, or estates-tail, in undivided shares, as tenants in common, the defendant is entitled to our judgment; and we are of opinion that he is, either on one of these grounds or the other.

For the plaintiff it was contended, that in order to effectuate the general intent of the testator, the particular intent must be sacrificed; and that here the general intent was, that all the heirs of the body of the devisee, *Francis*, should take before his sisters and brother, and therefore that he took an estate-tail under the will.

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The doctrine that the general intent must overrule the particular intent, has been much, and we conceive justly, objected to of late, as being, as a general proposition, incorrect and vague, and likely to lead in its application to erroneous results. In its origin it was merely descriptive of the operation of the rule in *Shelley's* case (a), and it has been since laid down in others, where effect has been given to technical words of limitation, and other words shewing the intention of the testator that the objects of his bounty should take in a different way from that which the law allows, have been rejected; but in the latter cases the more correct mode of stating the rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense; and so it is said by Lord *Redesdale*, in *Doe d. Jesson v. Wright* (b). This doctrine of general and particular intent ought to be carried no further than this; and thus explained, it should be applied to this and all other wills. Another undoubted rule of construction is, that every part of that which the testator meant by the words he has used, should be carried into effect as far as the law will permit, but no further, and that no part should be rejected, except what the law makes it necessary to reject.

We have now to apply these rules to the instrument in question, which is a very inaccurately penned will, and to some part of which it is impossible to give any meaning at all in the ordinary mode of reading it.

It is perfectly clear that the testator meant to give a remainder, after the death of his eldest son *Francis*, to his (*Francis's*) child or children living at the time of his decease, or born in due time afterwards, as purchasers as tenants in common, and not as joint tenants; and if the limitation to the children had stopped there, there is no

(a) As to which, see *ante*, vol. i. 667 (g), 661 (b). (b) 1 Bligh, 81:

doubt it would have given them estates for life. The will then proceeds to give an equal benefit of survivorship among the rest of the said children, if more than one; and any of them shall die without leaving issue. If it stood there, as the testator did not mean another child to take until failure of the issue of the first, each child would have an estate tail in his undivided share. Then follows a clause which is unintelligible, and the language of which must be varied in order to give it some meaning.

On the part of the plaintiff, it is proposed to read, instead of the words "without issue," the words "leaving issue."

Assuming that alteration to be right, the argument founded upon the whole will is, that the testator meant the estate left to each of his sons and daughters, to go to the whole line of issue of those sons and daughters respectively; and only on failure of the whole line of issue to go over: and this on account of the use of the term "issue of the sons and daughters," which word "issue" is here to be considered (as it generally is) a word of limitation, and equivalent to the term "heirs of the body," and embracing the whole line of lineal descendants; and therefore it is contended, that each son and daughter took an estate-tail in the portion left to him or her. But if the term "issue" is here a word of limitation, why is it not equally so in the part in which the estate is given over to the surviving children of the sons and daughters, if any of them shall die without leaving issue? From which it is clear that the testator does not mean the survivors to take, till failure of all the issue of the deceased children. If the term "issue" has here the same meaning, then the children living at the time of the death of the sons and daughters respectively must take estates-tail, as tenants in common, in their respective shares: with cross-remainders either for life or in tail, (*which it is unnecessary to decide, and that question will depend upon the construction of the very ambiguous passage already referred to,*) with remainder to the sons and

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daughters in tail, in their respective shares, and remainders over: and this construction makes the least sacrifice of the testator's declared intention—it preserves estates to all his grand-children living at the death of his sons and daughters, as tenants in common, which it is clear the testator intended to give: and it also includes the descendants of a grand-child dying in the son's or daughter's lifetime, though the estate to them is postponed to that of the children: and it includes all the issue of each son and daughter before the estate goes over. The estate-tail in the sons and daughters takes effect, not in derogation of, but by way of remainder on, the express estates given to the children of the sons and daughters; in which respect it resembles the case of *Doe dem. Bean v. Halley (a)*. It is true, that these grand-children cannot take estates for life, as the testator intended, for the rule in *Shelley's case (b)* prevents it; nor the children of those children estates for life as tenants in common, for the rule of law against perpetuities prevents that, but this is unavoidable: and no construction can carry into effect all the testator wished.

It is, however, said that the term "issue," as applied to the children, is not to be read as a word of limitation, including *all* the descendants, but is explained by the context to mean the children of the children to whom estates for life are before given; but if the word "issue" means children in one part, what reason is there why it should not have the same meaning in another? for it is perfectly clear that the testator intends the estate to go to the issue of the sons and daughters in the same manner as to the issue of the children: and the same description of persons must take under that denomination in both cases. Hence, if the word "issue" is to be construed as "children," it is to be so construed in both cases; and then the eldest son, the father of the lessor of the plaintiff, certainly did not take an estate-tail, and the plaintiff cannot succeed.

(a) 8 T. R. 5, *ante*, 627.(b) *Vide ante*, vol. i. 657(g), 661 (b).

The case, therefore, is reduced to this point : the plaintiff must fail, unless his lessor took an estate tail, and the lessor of the plaintiff could not take an estate tail except in remainder, the defendant and his brothers and sisters having previous estates tail in the property.

The cases upon which the plaintiff principally relies are that of *Murthwaite v. Jenkinson* (a), (which is contended not to be distinguishable from the present,) and *Wollen v. Andrewes* (b).

In the first-mentioned case, the devise was to the nieces, and after their decease to their lawful issue, for life ; and if either of the nieces should die, in the lifetime of the others, without issue of her body, the share of the niece dying without issue should go to the survivors and the lawful issue of the survivors. This case is an example of the proper construction of the word "issue," which was considered as a word of limitation, embracing all the descendants ; and in which the inconsistent intent that all those descendants should take for life, formed no reason why they should not take at all ; and why the word should not be construed in its proper and legal sense. Here, the term "issue" is not used, in the devise in remainder, after the death of the son and daughters, but the estate is expressly devised to the children living at the death of the sons and daughters, which circumstance completely distinguishes that case from the present.

In the other case relied on, (*Wollen v. Andrewes*), the devise was to the children of the testator of one-sixth part each, for life ; after their deaths to all and singular their child and children, in equal parts, and so on from children to children ; and if any of his children should die without leaving issue, then to the survivor. It was held that the children of the testator took an estate-tail. This differs from the present case in two respects. Here, the devise is not to all the grand-children, but there is a

(a) 2 Barn. & Cressw. 357 ; 3 Dowl. & Ryl. 674.

(b) 2 Bingham. 126 ; 9 B. Moore, 248 ; ante, 625, 627.

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selection of lives with trustees to support. In that case there was no alternative but to hold that there was to be a series of estates for life, or an estate-tail in the children—here there is, by giving an estate-tail to the grand-children.

Thinking, therefore, that this mode of construing the will gives effect to the greater part of it, and as far as the rules of law will permit, the whole; whilst that contended for on the part of the plaintiff strikes out altogether the devise to the grand-children, our opinion is, that the former ought to be preferred, and that our judgment must be for the defendant.

Judgment for the defendant.

In the Matter of JOHN WALLER POE.

A writ of prohibition cannot issue to a court-martial after sentence pronounced by the court and ratified by his Majesty, and execution, by dismissal from the army, in pursuance of such sentence.

J. W. POE, being a lieutenant in the 55th regiment, was arraigned and tried before a general court-martial, held at the garrison at Chatham, on the 26th day of August last, upon a charge, for that he, being a passenger on board the ship *Cæsar*, on her passage from Calcutta to England, was, on or about the 19th February, 1882, accused of stealing a 5*l.* Bank of England note, and certain articles of wearing apparel, the property of *Thomas Ross*, then acting as his servant, and which property *Ross* alleged had been taken out of his trunks in *Lieut. Poe's* cabin; that this accusation having been thereupon inquired into by Captain *Watt*, commanding the ship, by Lieutenant-Colonel *Cunningham* and other officers on board, the said officers and passengers forthwith expelled him from their table and society, not permitting him to enter the general cabin or to have any association whatever with them during the remainder of the voyage; that *Poe* nevertheless, under circumstances so degrading and disgraceful to him, neither then nor at any time afterwards, took measures as became an officer and a gentleman to vindicate his honour and reputation; all such conduct aforesaid being to the prejudice of good order and military discipline.

In his defence, *Lieut. Poe*, by his counsel, objected to the

charge and to his trial thereupon, that it neither expressly nor constructively charged any military offence or infraction of any of the articles of war, and that it did not impute to him any positive act of misconduct or neglect, to the prejudice of good order and military discipline; and that even admitting the whole of the charge to be true, in as far as it stated any *fact*, there was nothing in the accusation which rendered him liable to be arraigned and tried as an officer in his majesty's military service, for any offence or misdemeanor, neglect or omission, to the prejudice of good order and military discipline.

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The Court however heard evidence, proceeded with the trial, and transmitted to the Commander-in-chief of the Forces, the following decision:—"The Court having maturely weighed and considered the evidence adduced in support of the prosecution, together with the prisoner's defence and the evidence adduced in support of it, is of opinion that the prisoner is guilty of the whole of the charge produced against him in breach of the articles of war. The Court does therefore sentence him, the prisoner, to be dismissed his Majesty's service. The Court, in coming to the above finding and sentence, trusts it may be allowed to add, that it has considered the charge produced against the prisoner entirely in a military point of view, as affecting the good order and discipline of the army, and that it does not mean by this sentence to offer any opinion as to the original charge of theft, of which the prisoner was accused by the man *Ross*."

Sentence of
court-martial.

This sentence was transmitted by the Judge Advocate to his Majesty. The sentence was ratified and approved by the King, and Lieut. *Poe* was accordingly dismissed from the army. Ratification.

The above facts appeared in an affidavit filed by Lieut. *Poe*, who also stated therein, that at the time mentioned in the charge, Lieut. *Poe* was proceeding home in the ship *Cæsar* as a private passenger, on leave of absence for the usual term of two years from his regiment, which then was on service in India.

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*Price* now moved, upon the affidavit above-mentioned, for a rule to shew cause why a writ of prohibition should not issue, directed to the judge martial and advocate general of the army, prohibiting the carrying of this sentence into effect. The court-martial has exceeded its jurisdiction in taking cognizance of this matter, and this Court has full authority to grant a prohibition to restrain the execution of the sentence. A commission under the sign manual could give the court no power to try the defendant for an offence not within the articles of war. This is not within any of the articles of war. The 70th article of war (upon which, it is presumed, that this accusation is founded) is as follows—"and all crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not specified in the foregoing cases, or in our articles of war, shall be taken cognizance of by courts-martial, according to the nature and degree of the offence." It is denied that the party was in a degraded or disgraceful situation, or that the facts brought him within the meaning of this article. He was not called upon to come forward and *demand* inquiry. He naturally expected to be *charged* with this theft, and knew he would be triumphantly acquitted. If the latent charge was that he had not challenged to fight a duel with him, any of those persons who excluded him from the mess of the ship, that was not contrary to good order and discipline. He was in a humiliating situation, and his military judges therefore concluded he must be in a degraded situation. [*Denman*, C. J. How does this affect the question of *jurisdiction*?] These circumstances shew that the court has exceeded its jurisdiction. In *Grant v. Sir Charles Gould*(a), upon an application similar to the present, the Court granted a rule to shew cause. The fourth ground there taken was, that the offence charged was not an offence cognizable by law. Upon this last ground there was no argument, and no notice is taken of it in the judgment, but there is suffi-

(a) 2 H. Bla. 69.

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cient in the judgment to shew the Court has jurisdiction. [Parke, J. Is there any thing more to be done in this case? Has the sentence been confirmed and communicated by his Majesty to Lieut. Poe?] It has; but it is a continuing sentence. Suppose a party has been erroneously sentenced to six months' imprisonment, and two months have elapsed since the sentence has been put into execution, this Court would interfere. The party in this case is in a situation similar to that of a person imprisoned for life. The Judge Advocate may, if he pleases, re-assemble the court-martial. [Taunton, J. How can the court-martial re-assemble? They have been called together for a particular purpose, which purpose has been effected. The proper method for a party who thinks himself aggrieved by the proceedings of a court-martial, is to memorialize the king; and that being done, a very strict and painful investigation of the proceedings of the court-martial will be entered into by the Judge Advocate. Parke, J. If we granted this application, no sentence of any court-martial would be secure, whilst the party accused was alive. If you can furnish us with any precedent, we should be glad of it.] It is submitted that the case of *Grant v. Sir Charles Gould* is a precedent.

DENMAN, C. J.—In that case something remained to be done. We will allow you to mention this case again, if you can find a precedent. Before we can go into the question, whether there is any good charge, we must know whether we can grant a prohibition to an inferior court, where the sentence which is called in question has been executed.

On a subsequent day, Price renewed his application. Many authorities have been found which shew that the Court has ample power to grant a prohibition, where a sentence like this has been executed. There are some cases which may appear to be authorities against the position, but the preponderance of authority is much in favour of

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the right to issue a prohibition. All the cases on the subject are before the Court. In the *Articuli Cleri* (a) is the following passage:—"As touching the time when prohibitions are granted, it seemeth strange to us that they are not only granted at the suit of the defendant, in the Ecclesiastical Court, after his answer, (whereby he affirmeth the jurisdiction of the said Court, and submitteth unto the same,) but also after all allegations and proofs on both sides, when the cause is fully instructed and furnished for sentence, yea, after two or three sentences given, and *after execution of the said sentence or sentences*, and when the party for his long-continued disobedience is laid in prison upon the writ of excommunicato capiendo, which courses, forasmuch as they are against the rules of the common law in like cases, (as we take it,) and do tend so greatly to the delay of justice, vexation and charge of the subject, and the disgrace and discredit of his majesty's jurisdiction ecclesiastical, the judges, (as we suppose,) notwithstanding their great learning in the laws, will be hardly able in defence of them to satisfy your lordships."

Answer. "Prohibitions by law are to be granted at any time to restrain a Court to intermeddle with or execute any thing which by law they ought not to hold plea of, and they are much mistaken that maintain the contrary. And it is the folly of such as will proceed in the Ecclesiastical Court, for that whereof that Court has not jurisdiction. And so themselves (by their extraordinary dealing) are the cause of such extraordinary charges, and not the law; for their proceedings in such case are *coram non iudice*. And the king's courts that may award prohibitions, being informed either by the parties themselves or by any stranger, that any court temporal or ecclesiastical doth hold plea of that, (whereof they have not jurisdiction,) may lawfully prohibit the same, *as well after judgment and execution as before*." See also *Articuli Cleri* (b), *Scadding's case* (c), *Sparks v. Martyn* (d). In *Trisham's case* (e) a prohibition

(a) 2 Inst. 602, Obj. 3.

(b) 2 Inst. 599.

(c) Yelv. 134.

(d) 1 Ventris, 1.

(e) Cited in *Eaton v. Ayliffe*, Hetley's Rep. 95.

was granted to the Ecclesiastical Court *after appeal*; *Leigh v. Bailey* (a), *Oldis v. Domville* (b), *Russell v. Oldish and another* (c). In *Viner's Abridgment*, tit. Prohibition (A.), in the margin(d), it is said prohibition issues out of the Chancery B.R. or C.B. into the Spiritual Court, Admiralty, Court of Chivalry, &c. to forbid a judge, &c. to proceed in a cause that belongs to the common law courts, or that belongs not to that jurisdiction, *though the courts at law can give no remedy*, &c. Again, it is also there said, the king's courts that may award prohibitions, being informed by plaintiff or defendant, or by any stranger, that any court, temporal or ecclesiastical, do hold plea where they have no jurisdiction, may lawfully prohibit that court, *as well after judgment and execution as before*. And it is there said that prohibitions are issuable *ex debito justitiæ*: *Vin. Abridg.* tit. Prohibition (B.), fol. 5 (e). In *Shotter v. Friend* (f), it is said it is not too late to come for a prohibition *after sentence*; for the sentence in this case is the grievance. *Dudley v. Crompton* (g); *Walker v. Adams* (h); *Fitz. Nat. Brev.* 106; *Mendyke v. Stint* (i); *Carter v. Firmin* (k); *Stevens v. Cripps* (l); *Brabin v. Trediman* (m); *Sir John Bennet v. Dr. Easdale* (n); *Isabel Peel's case* (o); *Home v. Lord Bentinck* (p); *Scarborough v. Justus Lyrus* (q), *contra*; *Home v. Earl of Camden* (r); *Registrum Brevium* (s).

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In the course of the term DENMAN, C. J. delivered the judgment of the Court.

An application was made for a rule to shew cause why a writ of prohibition should not issue, prohibiting the execution of a sentence of a court-martial, which in the month

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| (a) Owen, 122.                | (k) 4 Mod. 152.      |
| (b) Shower, P. C. 61, 65.     | (l) Litt. Rep. 165.  |
| (c) Ibid.                     | (m) 2 Rolle Rep. 24. |
| (d) Vol. xvii. p. 547.        | (n) Cro. Car. 55.    |
| (e) Ibid. p. 549.             | (o) Ibid. 113.       |
| (f) 2 Salk. 547.              | (p) 8 Price, 249.    |
| (g) March, 153.               | (q) Latch, 252.      |
| (h) 1 Sid. 331; 2 Keble, 200. | (r) 2 H. Black. 533. |
| (i) 2 Mod. 272.               | (s) 38, 39, 42, 43.  |



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of August had been holden at Chatham, on charges preferred against an officer in the 55th regiment, on the ground that the facts alleged in the charge were insufficient to bring the party within the Articles of War.

In the course of the statement it appeared that a commission had been directed to certain officers for the purpose of carrying on the inquiry; that witnesses had been examined, and that the trial had proceeded to its termination; that the Court had pronounced the defendant guilty, and sentenced him to be dismissed from his majesty's service; and, finally, that that sentence had been ratified and approved by the king, who had accordingly dismissed the applicant from the army.

We could not understand why, and to what end, a prohibition should be granted; nor to whom it could be directed; nor what it could prohibit: for not only had the sentence been carried into complete execution, but the court-martial itself, having performed all its functions, had ceased to exist. The learned counsel, however, argued that the writ might be directed to the Judge Advocate, as in the case of *Grant v. Gould*(a), which case, or rather some parts of Lord *Loughborough's* elaborate judgment upon it, were supposed to furnish authority for granting this rule.

We may here observe, that the rule for a prohibition was there discharged, on its being satisfactorily proved that no valid objection to the proceedings of the court-martial existed, and nothing was said respecting the person to whom the writ was to be addressed; otherwise it is not easy to see what power the Judge Advocate could possess after the sentence had been reported to his Majesty, and received his royal approbation: and the prayer of the suggestion is remarkable, in humbly imploring that "the writ may be directed to Sir *Charles Gould*, the Judge Advocate, or to some other competent person or persons, to hinder him from proceeding in ordering the execution of the sentence." That case clearly falls short of the purpose for which it was cited, as the sentence had *not* been fully

(a) 2 H. Bla. 69.

executed; and this fact is stated in the affidavit on which the rule was founded.

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We therefore desired to be furnished with some authority (if any could be found) for granting a prohibition after complete execution of the sentence imposed by the inferior Court; and several cases were at a subsequent day laid before us, none of which, however, on examination, appear to us to establish the proposition, while others are examples of the contrary doctrine being acted upon.

In *Hall v. Norwood* (a), the Court held that a motion for a prohibition came too late, after judgment and execution in the Court below, because there is no person who can be prohibited. And a similar view is taken in *Darby v. Cosens* (b), by *Ashhurst* and *Buller*, JJ., the only Judges in Court, who support the prohibition on the ground that something remained to be done.

But it is needless to enter at large into the law of prohibition in general, for a court-martial stands on grounds peculiar to itself. As soon as it pronounced its sentence, it ceased to exist. To the Judge Advocate no other duty then belonged than that of transmitting the sentence for approbation; and even supposing the case of *Grant v. Gould* to furnish some argument that a writ of this nature might be directed to him before execution of the sentence, still it is impossible to discover what he could be required to abstain from after execution.

If then the writ were to issue at all, we see no court or individual to whom it could be addressed, other than the king himself, who, acting on the sentence, has been pleased to dismiss the officer from his service.

Now, admitting for a moment that it were possible to address any writ directly to his majesty (c), when it is considered that this power is undoubtedly inherent in the crown, and might have been lawfully executed even without any court-martial, it will at once appear manifest that no pro-

(a) 1 Sid. 166.

(b) 1 T. R. 552.

(c) *Vide* Com. Dig. *Action* (C. 1.)

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daughters in tail, in their respective shares, and remainders over: and this construction makes the least sacrifice of the testator's declared intention—it preserves estates to all his grand-children living at the death of his sons and daughters, as tenants in common, which it is clear the testator intended to give: and it also includes the descendants of a grand-child dying in the son's or daughter's lifetime, though the estate to them is postponed to that of the children: and it includes all the issue of each son and daughter before the estate goes over. The estate-tail in the sons and daughters takes effect, not in derogation of, but by way of remainder on, the express estates given to the children of the sons and daughters; in which respect it resembles the case of *Doe dem. Bean v. Halley (a)*. It is true, that these grand-children cannot take estates for life, as the testator intended, for the rule in *Shelley's case (b)* prevents it; nor the children of those children estates for life as tenants in common, for the rule of law against perpetuities prevents that, but this is unavoidable: and no construction can carry into effect all the testator wished.

It is, however, said that the term "issue," as applied to the children, is not to be read as a word of limitation, including *all* the descendants, but is explained by the context to mean the children of the children to whom estates for life are before given; but if the word "issue" means children in one part, what reason is there why it should not have the same meaning in another? for it is perfectly clear that the testator intends the estate to go to the issue of the sons and daughters in the same manner as to the issue of the children: and the same description of persons must take under that denomination in both cases. Hence, if the word "issue" is to be construed as "children," it is to be so construed in both cases; and then the eldest son, the father of the lessor of the plaintiff, certainly did not take an estate-tail, and the plaintiff cannot succeed.

(a) 8 T. R. 5, *ante*, 627.

(b) *Vide ante*, vol. i. 657(g), 661(b).

The case, therefore, is reduced to this point: the plaintiff must fail, unless his lessor took an estate tail, and the lessor of the plaintiff could not take an estate tail except in remainder, the defendant and his brothers and sisters having previous estates tail in the property.

The cases upon which the plaintiff principally relies are that of *Murthwaite v. Jenkinson* (a), (which is contended not to be distinguishable from the present,) and *Wollen v. Andrewes* (b).

In the first-mentioned case, the devise was to the nieces, and after their decease to their lawful issue, for life; and if either of the nieces should die, in the lifetime of the others, without issue of her body, the share of the niece dying without issue should go to the survivors and the lawful issue of the survivors. This case is an example of the proper construction of the word "issue," which was considered as a word of limitation, embracing all the descendants; and in which the inconsistent intent that all those descendants should take for life, formed no reason why they should not take at all; and why the word should not be construed in its proper and legal sense. Here, the term "issue" is not used, in the devise in remainder, after the death of the son and daughters, but the estate is expressly devised to the children living at the death of the sons and daughters, which circumstance completely distinguishes that case from the present.

In the other case relied on, (*Wollen v. Andrewes*), the devise was to the children of the testator of one-sixth part each, for life; after their deaths to all and singular their child and children, in equal parts, and so on from children to children; and if any of his children should die without leaving issue, then to the survivor. It was held that the children of the testator took an estate-tail. This differs from the present case in two respects. Here, the devise is not to all the grand-children, but there is a

(a) 2 Barn. & Cressw. 357; 3 Dowl. & Ryl. 674.

(b) 2 Bingh. 126; 9 B. Moore, 248; ante, 625, 627.

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selection of lives with trustees to support. In that case there was no alternative but to hold that there was to be a series of estates for life, or an estate-tail in the children—here there is, by giving an estate-tail to the grand-children.

Thinking, therefore, that this mode of construing the will gives effect to the greater part of it, and as far as the rules of law will permit, the whole; whilst that contended for on the part of the plaintiff strikes out altogether the devise to the grand-children, our opinion is, that the former ought to be preferred, and that our judgment must be for the defendant.

Judgment for the defendant.

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In the Matter of JOHN WALLER POE.

A writ of prohibition cannot issue to a court-martial after sentence pronounced by the court and ratified by his Majesty, and execution, by dismissal from the army, in pursuance of such sentence.

*J. W. POE*, being a lieutenant in the 55th regiment, was arraigned and tried before a general court-martial, held at the garrison at Chatham, on the 26th day of August last, upon a charge, for that he, being a passenger on board the ship *Cæsar*, on her passage from Calcutta to England, was, on or about the 12th February, 1839, accused of stealing a 5*l*. Bank of England note, and certain articles of wearing apparel, the property of *Thomas Ross*, then acting as his servant, and which property *Ross* alleged had been taken out of his trunks in Lieut. *Poe's* cabin; that this accusation having been thereupon inquired into by Captain *Watt*, commanding the ship, by Lieutenant-Colonel *Cunningham* and other officers on board, the said officers and passengers forthwith expelled him from their table and society, not permitting him to enter the general cabin or to have any association whatever with them during the remainder of the voyage; that *Poe* nevertheless, under circumstances so degrading and disgraceful to him, neither then nor at any time afterwards, took measures as became an officer and a gentleman to vindicate his honour and reputation; all such conduct aforesaid being to the prejudice of good order and military discipline.

In his defence, Lieut. *Poe*, by his counsel, objected to the

charge and to his trial thereupon, that it neither expressly nor constructively charged any military offence or infraction of any of the articles of war, and that it did not impute to him any positive act of misconduct or neglect, to the prejudice of good order and military discipline; and that even admitting the whole of the charge to be true, in as far as it stated any *fact*, there was nothing in the accusation which rendered him liable to be arraigned and tried as an officer in his majesty's military service, for any offence or misdemeanour, neglect or omission, to the prejudice of good order and military discipline.

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The Court however heard evidence, proceeded with the trial, and transmitted to the Commander-in-chief of the Forces, the following decision:—"The Court having maturely weighed and considered the evidence adduced in support of the prosecution, together with the prisoner's defence and the evidence adduced in support of it, is of opinion that the prisoner is guilty of the whole of the charge produced against him in breach of the articles of war. The Court does therefore sentence him, the prisoner, to be dismissed his Majesty's service. The Court, in coming to the above finding and sentence, trusts it may be allowed to add, that it has considered the charge produced against the prisoner entirely in a military point of view, as affecting the good order and discipline of the army, and that it does not mean by this sentence to offer any opinion as to the original charge of theft, of which the prisoner was accused by the man *Ross*."

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court-martial.

This sentence was transmitted by the Judge Advocate to his Majesty. The sentence was ratified and approved by the King, and Lieut. *Poe* was accordingly dismissed from the army. Ratification.

The above facts appeared in an affidavit filed by Lieut. *Poe*, who also stated therein, that at the time mentioned in the charge, Lieut. *Poe* was proceeding home in the ship *Cæsar* as a private passenger, on leave of absence for the usual term of two years from his regiment, which then was on service in India.

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which the goods were sold, and directed that they should stand in the situation of creditors to *L. & Co.* for the residue, should not be set aside, and that instead thereof it should be declared that *W. and R. & Co.* are entitled only to so much as the dividends already declared amounted to.

J. H. Lloyd, for *Westzynthius* and *R. & Co.* obtained a rule to shew cause why the same part of the award should not be set aside, and *W. and R. & Co.* be declared to be entitled to the whole proceeds of the goods.

Both rules coming on to be heard together, the Court, upon a question raised as to which party was entitled to begin, said, that the proper course was for *Mr. Pollock* to commence by shewing cause against *Mr. Lloyd's* rule, and then for *Mr. Lloyd* to shew cause against the rule obtained by *Mr. Pollock*, who should have the benefit of the reply.

F. Pollock, for the assignees of *L. & Co.* The consignor had no right whatever to stop in transitu. The question is, what is the effect of a bonâ fide indorsement of a bill of lading. Is it to be understood that when the bill of lading is thus indorsed, the consignor has still his right of stopping in transitu unimpaired? Before proceeding to the authorities to shew that he has not, it will be well to call the attention of the Court to this undoubted fact, that advances have been made upon these very goods to the prejudice of the general creditors of *L. & Co.*, although there may have been enough left in the hands of the pledgee, after satisfaction of his own claims, to satisfy the debt of the consignor. No one who advances money upon goods, advances the whole estimated value, but according to certain known proportions, which vary in different trades. The consignor cannot stop in transitu under these circumstances. By giving credit to the party who purchases from him, and delivering to

him the bill of lading, the consignor has enabled him to obtain upon the goods, in his apparent ownership, a great part of the value. There being a surplus after the sale of all the goods in the hands of the pledgee, equal to the value of the goods of the consignor, it is said that he is entitled to have that value paid over to him. That would be to throw upon the assignees, that is, upon the estate, the debt of the persons advancing money upon the goods of the consignor, which he had allowed his vendee to take into the market, and that as his own. There has not been found any decision appropriating the surplus in the manner claimed in this case. Now, what is the effect of the indorsement of the bill of lading? *Lickbarrow v. Mason*(a) makes this point perfectly clear. There, the bill of lading had been indorsed for a valuable consideration by the consignee; and it was held, that by the indorsement, the right of the consignor to stop in transitu, as under the circumstances he might have done if the bill of lading had remained in the hands of the consignee, was gone. The question put at the bar was, whether the bonâ fide indorsement for a valuable consideration of a bill of lading to a third person, is not an absolute transfer of the whole property. *Buller, J.*, who in his judgment goes over the whole of the preceding cases, said, "I make the question even more general than was made at the bar, namely, whether a bill of lading is by law a transfer of the property;" and then he proceeds to shew that it does transfer the property [*Purke, J.* My present impression is, that by the indorsement of a bill of lading for a valuable consideration, a right to stoppage in transitu by the consignor is put an end to.] There is here an indorsement for valuable consideration; and although it turns out that when the goods of the bankrupt in the hands of the pledgee come to be sold, there is a surplus sufficient to satisfy the consignor, yet the question comes to this, whether the consignee's

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(a) 2 T. R. 63; *Mason v. Lickbarrow*, in error, 1 H. Bla. 357; *Lickbarrow v. Mason*, in error, Dom. Proc., 6 East, 21, n.

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goods were not indistinguishably mixed up with the bankrupt's effects, and whether the assignment of the bill of lading is not a legal transfer, or delivery of the goods. The case is the same as if the party had actually received goods sold upon credit and had pledged them. If the stoppage in transitu entitles the consignor in such a case as this to be satisfied out of the surplus, an insolvent consignee will have great opportunities of defrauding his creditors, by raising money for his present purposes upon goods entrusted to him, throwing the burthen of repaying it upon his assignees.

J. H. Lloyd, contra. The principle upon which the award is founded, is the right principle, because it finds that Westzynthius was entitled to stop in transitu, subject to the rights of the pledgee. The question upon the award is, whether the act of Westzynthius, which was equivalent to stoppage in transitu, does not give him an equitable claim to goods, subject to the right of the pledgee. The doctrine, as to right of stoppage in transitu, is purely and entirely equitable, having been borrowed from Courts of Equity and adopted by the Courts of Law; and therefore, though the Courts of Law have given it a legal sanction, it must still be treated according to rules of equity. Such was the opinion of *Buller, J.*, as expressed in *Lickbarrow v. Mason (a)*, and of Lord *Kenyon* in *Hodgson v. Loy (b)*. It is the *revendication* of the civil law (c), and the law of Scot-

(a) 6 East, 21, in notis.

(b) 7 T. R. 445.

(c) REVENDICATION is the right of an unpaid vendor, upon the insolvency of the vendee, to reclaim in specie such part of the goods as remains in the hands of the vendee entire and without having changed its quality. *Savary, Pa-rere*, 85; *Ferrière, Dictionnaire de Droit, tit. Revendication*.

In constructing the Code de Commerce, the French legislators

rejected the old law of *revendication* in mercantile transactions, and adopted that of stoppage in transitu. The motives of the change will be found in the "*Discours des Orateurs du Gouvernement*." The name "*revendication*" is, however, still continued, and forms a title in the Code de Commerce. By art. 578, goods cannot be stopped in transitu (*revendiquées*), if before arrival they have been sold without fraud, upon invoices, bills of lading, or

land (a), though called stoppage in transitu. If goods have actually come into the corporal possession of the insolvent

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bills of parcels." Nothing is said about *pledging* the bill of lading.

(a) In *Bell's Commentaries* on the Laws of Scotland, 3d edition, book ii, part ii, chap. i, art. 3, "Of the effect of insolvency on the contract of sale," § 1. "Of stopping of goods in transitu," it is said, "The privilege to stop goods in transitu is a qualified extension in equity of that rule of mutual contract, by which either party may withhold performance on the other becoming unable to perform his part; and it appears that equity then interposes only on the condition, that the vendor who resumes his goods against the creditors of the vendee, thereby abandons his contract, and holds it as rescinded ab initio. The great principle on which this doctrine depends is well known in the law of Scotland, though the doctrine, under its present name and shape, has been lately introduced. There formerly prevailed in Scotland a doctrine of more extensive application, which superseded almost entirely the distinctions that were found necessary in England. [This was the doctrine of *restitution* grounded on presumptive fraud, *inter triduum* of the bankruptcy of the vendee. The last case in which it was, in Scotland, admitted to rule the decision, was that of *Allan and Stewart*, in 1789; but in the House of Lords, on the authority of Lord *Thurlow*, this doctrine was reprobated, and it has since been entirely abandoned. The consequence of this change

has been to introduce into the law of Scotland the whole doctrine of stopping in transitu, as established in England, with all its subtle and ill-understood distinctions, instead of the simple and natural system of the Scottish jurisprudence. If it be any consolation, we have an opportunity, in some late determinations in England, of seeing how much the judges have regretted the departure from simple principles. But decided cases and the practice of trade have so combined to fix many radical points in this department, that the English law must be followed now as undoubtedly a part of the law of Scotland."

The case of *Allan and Stewart*, here referred to, was as follows:—"At the bankruptcy of *Stein*, of large quantities of grain deliverable under a current contract, part had been actually delivered, part stopped in the very act of unloading, and part stopped before bulk had been broken. The Court of Session decided the case on the ground of presumptive fraud, as entitling the vendor to restitution, even of what was delivered. Lord Chancellor *Thurlow*, however, laid it down, and the House of Lords adopted it in their judgment, that the notion of a presumptive fraud was untenable; that the sole question in such a case is, Whether the goods have been stopped while in transitu, according to the rule which had, within a hundred years, been introduced into England: The cause was accordingly remitted, to apply this rule." Mr. *Bell* goes on to say,

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vendee, the vendor cannot touch them, but if he can obtain possession of them before they come to the vendee, he may do so. Where a bill of lading is delivered, as against a person to whom the goods are sold upon the faith of the consignee's leaving and indorsing the bill, the right of stoppage in transitu cannot prevail. This is the limit of the application of the doctrine. To this extent, and no further, *Lickbarrow v. Mason* goes. That case was decided upon the principle, that there were equal equitable titles in the vendor and the transferee, whilst the legal property was in the transferee as holder of the bill of lading. In that case the *jus tertii* interposes between the right which the unpaid vendor would have had against his own vendee: but there is no law which says, that where the bill of lading has been transferred by way of pledge, and the pledge to the transferee is satisfied, the right of stoppage in the unpaid vendor shall not come into operation as to the remainder. It is nothing more than a pledge, which does not operate to reduce into possession the right of the vendee. In the argument of *Buller, J.*, given in the note to *Newsome v. Thornton(a)*, that learned judge, after touching some other points, goes on, "This brings me to the two great questions in the cause, which are undoubtedly of as much importance to trade as

"The opinion of Lord *Thurlow*, in so far as respects the doctrine of presumptive fraud, will find a fitter place hereafter. Of what he said on the question of stoppage in transitu, the following note was taken at the time: "The question is, Whether the respondents (vendors) were entitled to stop certain cargoes of grain which were consigned or forwarded by them to *Stein*, the bankrupt, before the actual delivery to him, the bankruptcy having intervened. By the law of England, and, as I conceive, by the law of Scotland also, the shipping of goods to one who commissions

them, or the delivery of them to a carrier to be conveyed to him, was a complete sale. But within the last hundred years a rule has been introduced, from the customs of foreign nations, that in the case of the vendee's bankruptcy, the vendor might stop and take back the goods in transitu, or before they came into the hands of the vendee; and this is certainly now a part of the law of England, and I understand it to be law likewise in Scotland. 23 December, 1799, *Allan, Stewart & Co. v. Creditors of Stein.*"

1 Bell's Comm. 96, n. 2.

(a) 6 East, 21.

any questions which can ever arise. The first is, Whether at law the property of goods at sea passes by the indorsement of the bill of lading;" and then, after mentioning what the second question was, he, undoubtedly, goes on to say that the property at sea *did* pass by the delivery of the bill of lading; and he states the reasons why such an effect should be given to the delivery of the bill of lading (a). Those reasons are mercantile reasons applying only to the right of the transferee, the question being, Whether the transferee had acted *bonâ fide* and given value. The learned Judge concludes thus: "From the little experience which I acquired on this subject at Guildhall, I am confident that if the goods in question be retained from the plaintiff, without repaying him what he has advanced upon the credit of them, it will be mischievous to the trade and commerce of this country; and it seems to me that not only commercial interest, but plain justice and sound policy forbid it. To sum up the whole in very few words: the legal property was in the plaintiff; the right of seizing in transitu is founded on equity; no case in equity has ever suffered a man to seize goods in opposition to one who has obtained a legal title and has advanced money upon them, but Lord *Hardwicke's* opinion was clearly against it; and the law where it adopts the reasoning and principle of a Court of Equity, never has and never ought to exceed the bounds of equity itself." In that case the plaintiff was a person having advanced money upon the bill of lading, precisely in the situation of *Hardman & Co.* The language of the learned judge in that case shews, by implication, that if the money advanced to the transferee had been repaid to him by the unpaid vendor, the right of the latter to seize in transitu would have come into operation notwithstanding the transfer.

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(a) In France, Valin (*Nouveau Commentaire sur l'Ordonnance de la Marine*, vol. i. 572,) supported, and Emerigon (*Traité des Assurances et des Contrats à la Grosse*, vol. i. 319, 320,) combated, the negotiability of bills of lading. And see 1 Bell's Com. 110, where the English law of stoppage in transitu is fully examined.

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The Court sits here now as an equitable tribunal, the question being upon an award of an arbitrator, to whom all matters in dispute, legal and equitable, were referred. It is clear that the consignee could not recover from the pawnee the produce of the goods, in a Court of Equity, without repaying to the pawnee the money advanced by him, and also paying to the consignor the price of the goods. *Snee v. Prescott* (a) is an authority for this position; and although the decision of that case is in some respects shaken by *Buller, J.* in his argument before the House of Lords in the case of *Lickbarrow v. Mason* (b), yet upon the question as to the conflicting rights of consignor and consignee, it is ratified by that excellent mercantile judge. In commenting upon that case he says, "the decree was just and right in saying, that the consignor, who never had been paid for the goods, and the pawnee, who had advanced money upon the goods, should both be paid out of the goods before the consignee or his assignees should derive any benefit from them." If neither *Lapage & Co.* nor their assignees, could claim in equity, they can derive no title in equity from the simple circumstance of the pawnee's having paid the surplus over to them; for this would be to give to the pawnee the right to elect which of the two should have the goods. He that would seek the aid of a Court of Equity, must first do equity; the consignee, therefore, can have no title in equity until he has done equity to the consignor, who clearly has an equitable right against him. It is said that a delivery of a bill of lading to a transferee for value, operates as a reduction of the goods into the possession of the consignee. Suppose the bill of lading were placed with a banker by way of pledge, and was re-delivered in half an hour, the pledge being satisfied. By the indorsement to the banker the legal property has passed; but would the right of the consignee to seize in transitu be destroyed by the circumstance of the bill's having been pledged for half an hour? Would not his right rather revive? That which prevented the consignor's

(a) 1 Atk. 245.

(b) 6 East, 21, in notis.

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equity from vesting was *jus tertii*. The case of a bill of exchange is analogous. Between the original parties to the bill there may be certain equities: the bill is indorsed, and by this indorsement passes, the interest of the indorsee depending upon the amount advanced. As soon as the bill comes back from the indorsees the parties are remitted to their original position. [*Parke, J.* There is a difficulty as to whether what was done in this case amounted to a stoppage in transitu. Could you have brought trover against the captain?] The vendor had no power, at the time of the stopping in transitu, to prevent the goods passing to *Hardman & Co.* The meaning of the expression 'stoppage in transitu' is not confined to an actual preventing of the delivery, but it means generally a claim of right to hold the goods again until payment of the money due. It cannot be contended that the right exists as against a transferee for consideration, for he has the legal title and also an equal equitable right; but if the vendor, who still remains the unpaid vendor, pays off the debt of the transferee, his right as against the vendee revives. The circumstance of the captain's choosing or not choosing to retain the goods until the transferee is paid off, can make no difference; otherwise it would be at his option to favour which party he pleased. Suppose the bill of lading had been pledged for 100*l.*, and the captain had refused to deliver upon the bill of lading, the pledgee could have recovered in trover to the amount of his interest only. [*Parke, J.* The pledgee has the legal property. Who is to recover the remainder? Is the pledgor to have an action against the captain in respect of his equity of redemption? The captain cannot retain. Must not the pledgee, in whom the whole legal property is vested, recover the whole?(a)] He holds as

(a) By recovery in trover or in trespass the property in the goods converted vests in the defendant. P. 19 *H. 6*, fo. 65, pl. 5; *M. 6 H. 7*, fo. 8, 9, pl. 4, (*secus*, in detinue or replevin, *ibid.*) *Bishop v.*

*Lady Montague*, Cro. Eliz. 824; 18 Vin. Abr. 69. Unless therefore such pledgee of the bill of lading could recover the whole value of the goods, the vendor would be without remedy.

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trustee; and the question is, whether after satisfaction of the 100*l.* the legal right does not return to the vendor. [Patteson, J. The case of *Snee v. Prescott* does not shew that the consignor can bring trover for the goods.] Certainly as long as the bill of lading remained with the transferee, he only could bring trover; and as long as the goods remained in specie, he only could have the legal property; but as soon as the goods are sold he is a trustee, and the other parties would be driven into equity; and it is clear that the assignees of *Lapage & Co.* could not go into equity without paying the vendor. The Court is sitting here to determine upon the equitable title. The claim of the vendor is an equitable claim. If in equity and conscience *Hardman & Co.* hold the remainder, after paying themselves, to the use of the vendor, the Court will decide accordingly. It has been said, that it would be a hardship upon the general creditors if this stoppage in transitu were allowed to take effect. In *Lempriere v. Pasley*, (a) *Ashhurst, J.* says, "as between a person who has an equitable lien, and a third person who purchases the thing for a valuable consideration and without notice, the prior equitable lien shall not over-reach the title of the vendee. But as between the person who has an equitable lien and the assignees, if the lien subsisted before the bankruptcy, they shall never recover or retain the thing without discharging the money due. The party who has the equitable lien ought not to be on a footing with the rest of the creditors, for whom the assignees are trustees; for the creditors at large trusted to a *personal* credit; but he who has the lien never gave a *personal* credit, but trusted to the *thing*." So here the consignor did not give a *personal* credit, but trusted to the *thing*, and may now resume possession. There will be no inconvenience in holding, that the right of stoppage in transitu exists, subject to the right of the pledgee, and that upon satisfaction of the pledgee, the right of lien revives. Much has been said as to there having been an *actual deli-*

(a) 2 T. R. 490.

very. That is not the question correctly, for the *delivery* was complete as soon as the goods were first on board. The goods must come into the actual *possession* of the party or of his agent, which agent must not be an agent for carriage merely. In *Wiseman v. Vandeputt*(a), (which is the first case upon the subject,) where goods were consigned to a party who, before the goods came to his actual possession, became bankrupt without having paid for the goods, the Court of Chancery held, that if the consignors "could by any means get their goods again into their hands, or prevent their coming into the hands of the bankrupts, it was lawful for them so to do, and very allowable in equity." Here, the consignor has done all he could to prevent the goods from coming into the actual possession of the bankrupts. But they say that the right of third persons has intervened; to which, for the consignor, it is answered, that the *jus tertii* is at an end, and that the original state of things has revived.

Assuming, then, that the consignor has equity, subject to the right of the pledgee, it is submitted further, that the pledgee having two funds out of which he could pay himself, one of them belonging absolutely to the bankrupt, if he has done so out of that which is subject to the consignor's equity, the consignor is entitled to stand in the bankrupt's situation as to the remainder. As the award stands at present, the goods which are subject to the consignor's equitable lien are charged ratably with other goods in the hands of the pledgee, which belonged absolutely to the bankruptcy. This part of the award, it is now contended for the consignor, ought to be set aside. In *Maddock's Principles and Practice of the Court of Chancery*(b), it is said, that "it has been held, that if a party has two funds by which his debt is secured, a person having an interest in one fund only, has a right in equity to compel the former to resort to the other fund, if that is necessary, for the satisfaction of

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Equity to  
compel credi-  
tor having two  
securities, to  
resort first to  
that in which  
other creditors  
have no in-  
terest.

(a) 2 Vern. 203.

(b) Vol. i. 203 1st edition, 250 second edit.



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both. If, therefore, *A.* has two mortgages, and *B.* has one, *B.* has a right to throw *A.* upon the security which *B.* cannot touch." And this is the common doctrine with regard to marshalling securities. In the same work, upon the subject of marshalling assets (*a*) it is said, "when debts by specialty, which are a lien at law on the real estate, are discharged out of the personal assets by executors in ease of the lands, the creditors by simple contracts are entitled to stand pro tanto in the place of the creditors by specialty, and to have their debts satisfied out of the lands, and the Court will decree them to be sold for that purpose." "If a mortgagee of freehold or copyhold estates, who is also a specialty creditor, exhausts the personal assets, the simple contract creditors are entitled to stand in his place pro tanto against both the freehold and copyhold estates; upon the same principle the benefit of the *venditor's lien* on the estate for the purchase-money has been marshalled." In both these passages the case of *Aldrich v. Cooper* (*b*), considered to be the leading case, is referred to. *Robinson v. Tonge* (*c*) was not reconcilable with the general classes of cases. Lord *Eldon* was led to inquire into the principal question with much attention, and in three separate judgments held, that "if it is necessary for the payment of the creditors that the mortgagee (of freehold or copyhold estates) should be compelled to take his satisfaction out of the copyhold estate, if he takes it out of the freehold, those who are thereby disappointed must stand in his place as to the copyhold estate." In *Lanoy v. Duke of Athol* (*d*), it is said by Lord *Hardwicke* to be the constant equity of the Court of Chancery, that if a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien. *Copes v. Middleton* (*e*) and *Ex parte Goodman* (*f*) are also authorities to shew, that in this case

(*a*) 1st edit. 499; 2d edit. 615. 1 P. Wms. 680, 5th edit.

(*b*) 8 Vesey, 381. And see 1 (*d*) 2 Atk. 444.  
 Johns. (Am.) Chanc. Reports, 413. (*e*) 1 Turn. & Russ. 229.

(*c*) Stated in Mr. Cox's note to (*f*) 3 Madd. Rep. 373.

a Court of Equity would allow *Westzynthius* either to be paid out of his own fund; or if a portion of that has been taken, then pro tanto out of the other fund. [*Parke, J.* The case comes to one very narrow question. You clearly have no *legal* right to stop in transitu. The only question is, whether your attempt to exercise such a right created an equitable title.]

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*F. Pollock*, in reply. *Westzynthius* has neither law nor equity in his favour, and the award in that it gives him 18 per cent. is erroneous. If, however, he has *any* right, the award to him of that proportion is upon the correct principle. He cannot be entitled to more; for where goods are pledged jointly with other goods for a certain amount, they must be liable in respect of the proportion of the money advanced upon the goods generally. To decide otherwise, would be to split into two funds that which was pledged as one entire fund. Entirety of pledge.

Although a bill of lading is considered as goods and chattels in the order and possession of the bankrupt, it must be admitted, that the right to stop in transitu is an exception to the 72d section of the Bankrupt Act, which says, that goods in the order and disposition of the bankrupt, with the consent of the true owner, shall pass to the assignees. Here, however, is a case in which the bankrupt not only had the possession, but had sold to another party. [*Parke, J.* At the time of the bankruptcy *Lapage & Co.* had not the order and disposition of the goods, because if the bill is the symbol of possession, that was in the hands of *Hardman & Co.*, nor had *Lapage & Co.* the actual possession, for that was in the captain. It seems to me that the 72d section does not apply.] This is *beyond* the 72d section. It is a stronger case. Upon this question there are conflicting analogies and contending principles. If the Court be driven between the principles, the analogies are more forcible to lead the Court to conclude, that as by possession of the bill of lading the bankrupt was enabled to use the 6 Geo. 4, c. 16, s. 72.

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goods and actually to pledge them, he must be considered as having had the actual possession; and that the assignees are entitled to say that the consignor has no right, or that if he has any, then that he must bear with the assignees an equal proportion of the sum due to the pledgee, in return for having allowed the bankrupt to have such a degree of possession.

DENMAN, C. J.—The case appears to resolve itself into an equitable question, and as this arises upon an equitable award, it is the duty of the Court to inquire into what a Court of Equity would adjudge in this case; and therefore we will make those inquiries.

*Cur. adv. vult.*

Judgment.

DENMAN, C. J. now delivered the judgment of the Court. After stating the facts of the case, his lordship proceeded thus :—

No *legal* right to stop in transitu after indorsement of bill of lading.

In this case Mr. *Westzynthius*, who was the unpaid vendor at the time when his agents made the demand on the master of the vessel on board which the oil was, had no right to re-take possession on the insolvency of the vendee, *Lapage & Co.*, because the property in, and also the right to the possession of the goods, was unquestionably vested at that time in *Hardman & Co.*, the indorsees of the bill of lading, for a valuable consideration. The demand therefore of *Westzynthius* gave him no *legal* right to the property or possession of the goods; and it appears to us, that he can have no claim *at law*, except as arising out of the right of re-taking the possession of the goods themselves, which right was determined by the indorsement of the bill of lading. It is not necessary to determine what would have been his situation if either *Lapage & Co.* or himself had paid off *Hardman & Co.*'s demand prior to the notice given to the master, or to the actual receipt of the goods by the vendee.

But it is very properly urged in the able argument in sup-

port of Mr. *Westzynthius's* claim, that every question of equity, as well as of law, was referred to the arbitrator; and that the unpaid vendee had under the circumstances an equitable title to the goods, by virtue of the attempted stoppage, subject to *Hardman & Co.'s* right thereto, and also an equitable right to compel *Hardman & Co.*, the creditors, to pay themselves out of *Lapage & Co.'s* own property, which all the other goods, (except those of Messrs. *Rogers & Co.* whose claim abides the decision of this case,) certainly were. The learned arbitrator appears to have decided in favour of Mr. *Westzynthius* to this extent: that he had, by virtue of the demand or attempted stoppage in transitu, a preferable right, either at law or in equity, to the general creditors of *Lapage & Co.*; but he has allowed him only a proportion of the proceeds of his goods, thinking that all the goods deposited by *Lapage & Co.* with *Hardman & Co.* should be proportionably charged with the payment of the debt due to the latter. He has therefore deducted 8*l.* 6*s.* 7½*d.* per cent. of the proceeds of *Westzynthius's* goods, being the proportion which the debt due to *Hardman & Co.* bears to all the proceeds, and has directed the remainder to be paid over to him: and has therefore disallowed the equity claimed by *Westzynthius*, to oblige *Hardman & Co.* to pay themselves out of *Lapage & Co.'s* goods.

We think that the arbitrator was right in allowing *Westzynthius* to be in a better condition than the other creditors, but wrong in disallowing his claim to have all the proceeds paid over to him.

As *Westzynthius* would have had a clear right at law to resume the possession of the goods, on the insolvency of the vendee, had it not been for the transfer of the property and right of possession by the indorsement of the bill of lading, for a valuable consideration to *Hardman & Co.*, it appears to us, that in a Court of Equity such transfer would be treated as a pledge, or mortgage only, and *Westzynthius* would be considered as having resumed his former interest in the goods, subject to that pledge or mortgage; in ana-

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logy to the common case of a mortgage of a real estate, which is considered as a mere security, and the mortgagor as the owner of the land. We therefore think that *Westzynthius*, by his attempted stoppage in transitu, acquired a right to the goods in equity, (subject to *Hardman & Co.*'s lien thereon,) as against *Lapage & Co.* and their assignees, who are bound by the same equities that *Lapage & Co.* were. And this view of the case agrees with the opinion of *Buller, J.* in his comment on the case of *Ince v. Prescott*, in *Lickbarrow v. Mason (a)*.

Equity of unpaid vendor to compel indorsee of bill of lading to resort first to other property of the vendee.

If then Mr. *Westzynthius* had an equitable right to the oil, subject to *Hardman & Co.*'s lien thereon, for their debt, he would, by means of his goods, have become a surety to *Hardman & Co.* for *Lapage & Co.*'s debt, and would then have a clear equity to oblige *Hardman & Co.* to have recourse against *Lapage & Co.*'s own goods deposited with them, to pay his debt, in ease of the surety: and all the goods both of *Lapage & Co.* and *Westzynthius* having been sold, he would have a right to insist upon the proceeds of *Lapage & Co.*'s goods being appropriated in the first instance to the payment of the debt.

The result is, that Mr. *Lloyd's* rule must be made absolute, and Mr. *Pollock's* discharged.

(a) 6 East, 29, n.



#### FORD v. DILLON.

Claimants neglecting to appear under the Interpleader Act, are precluded by the terms of the rule from enforcing their claim.

**CLAIMS** having been made to the goods seized under a fieri facias, the sheriff obtained a rule under the Interpleader Act, 1 & 2 Will. 4, c. 56, calling before the Court the execution creditor and the adverse claimants. The sheriff caused all the parties to the rule to be duly served therewith. The execution creditor did not appear upon the



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terest half-yearly," and assigned breaches by non-payment of interest. Plea: non est factum.

At the trial before *Bosanquet*, J. at the Glamorganshire summer assizes, 1833, the jury found a verdict for the plaintiff, damages, one shilling.

*Vaughan Williams*, for the defendant, submitted, that this was a bond within the stat. of 8 & 9 Will. 3, c. 11, s. 8(a), and that the jury ought to have assessed 1s. damages on the issue joined plea of non est factum, and also the real damages sustained by the plaintiff in respect of the breaches assigned and proved. The learned judge gave the defendant leave to move the Court to make such an entry upon the record as they should think fit.

*Vaughan Williams* now moved that a verdict should be entered upon the record for the actual arrears of interest,

8 & 9 W. 3,  
c. 11, s. 8.

(a) Which enacts, "that in all actions which shall be commenced or prosecuted upon any bond or on any penal sum for non-performance of any covenants or agreements in any note, deed, or writing contained, the plaintiff may assign as many breaches as he shall think fit; and the jury upon trial of such action shall and may assess not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned as the plaintiff shall, upon the trial of the issues, prove to have been broken; and that the like judgment shall be entered on the verdict as heretofore hath been usually done in such like actions; and in case the defendant after such judgment entered, and before any execution executed, shall pay into the Court where the action shall be brought, to the use of the

plaintiff, such damages to be assessed by reason of all or any of the breaches of such covenants, together with the costs of suit, a stay of execution of the said judgment shall be entered upon record; or if by reason of any execution executed, the plaintiff shall be fully paid or satisfied all such damages so to be assessed, together with his costs of suit, and all reasonable charges and expenses for executing the said execution; and the lands or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record, but notwithstanding such judgment shall remain, continue, and be as a further security to the plaintiff for such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture, deed, or writing contained."

and that the plaintiff should not be at liberty to take out execution for more than that amount, the judgment remaining as a security for future breaches by non-payment of the subsequently accruing interest. The question is, whether this is a bond within the statute upon which the jury ought to assess the real damages sustained, or whether it should be treated as a common money bond. The plaintiff in his declaration has, by assigning breaches, treated it as within the statute. The damages ought to have been assessed at the real amount. [*Parke, J.* If the interest was not paid regularly, surely the 280*l.* might be demanded.] The condition is not worded with perspicuity; that which relates to the interest is inserted in the condition as a sort of covenant, and creates a secondary penalty (*a*). Suppose the bond had been conditioned for the payment of a principal sum within five years, and of an annuity in the meantime, with a provision, that upon default made in any of the payments the principal sum should become due, the real damages would certainly be assessed. This case is equally within the object of the statute, which, it was said, was to prevent a party from being under the necessity of going into a court of equity to obtain relief. [*Parke, J.* You say that there are here two penalties in one bond. I doubt whether equity would relieve in this case; and I do not think that this is within the statute.]

By the COURT,

Rule refused (*b*).

(*a*) The reporters, not having succeeded in their endeavours to obtain a copy of the bond and condition, are unable to vouch for

the literal accuracy of the statement of the condition, *ante* 663.

(*b*) And see *Willoughby v. Swinton*, 6 East, 550, 2 Smith, 663.

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REX v. WILLIAM BRYANT.—In the matter of *DOE v. ROE*.

A rule for an attachment for non-performance of the terms of the consent rule is properly entitled as in an action against the casual ejector, although obtained upon affidavits entitled as in an action against the tenant.

IN 1829 an attachment issued for non-payment of costs upon a consent rule in ejectment, brought on the demise of *William Bryant*. The consent rule was entitled *Doe v. Roe* simply, and the attachment was entitled, "In the matter of *Doe v. Roe*," as above, but the affidavits upon which the rule for an attachment was grounded were entitled "*Doe d. Bryant v. Chaddington*."

*Platt* shewed cause. The title of the attachment must follow that of the consent rule. The declaration is entitled *Doe v. Roe*, without mentioning any demise, and the consent rule is drawn up in this way. The attachment, therefore, is entitled quite correctly. It is said that the attachment and the affidavit cannot stand together, for that they are entitled differently. But as the rule itself was entitled *Doe v. Roe*, the attachment was regular; and as the affidavits for the attachment may have been prepared in the action of *Doe v. Chaddington*, therefore that also is sufficient.

But if the attachment be irregular, it cannot now be set aside on that ground; it is now too late to take advantage of the irregularity. The attachment was not granted as a rule absolute in the first instance, and when cause was shewn, the rule *nisi* was entitled as the attachment afterwards, and the objection should have been taken then, before cause shewn.

*Alexander and Humfrey*, contra. The point upon which the rule *nisi* was granted was, whether or not the rule on which the attachment issued was properly entitled. The affidavit and rule are differently entitled. If the rule is rightly entitled, it is not founded upon a properly entitled affidavit; and if the affidavit was correctly entitled, the title of the rule is wrong. With regard to the length of time that has elapsed, and the omission to take advantage of the

irregularity upon shewing cause against the rule for an attachment, it may be admitted that any subsequent step in the case would be a waiver of a mere irregularity, but here the attachment is absolutely void, and no delay can cure it. [*Patteson, J.* This is all quite right. The consent rule is entitled *Doe v. Roe*, and as the attachment is drawn up upon the consent rule, that would consequently be entitled in the matter of *Doe v. Roe*. The affidavits are differently entitled, because they are sworn after the real defendant has been substituted for the casual ejector. *Parke, J.* You are certainly too late to take advantage of an irregularity.] If a party is in custody, as here, upon a wrong instrument, the Court will not think any time too late.

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DENMAN, C.J.—We are none of us satisfied that the instrument is wrong; therefore let the rule be discharged.

Rule discharged.

RUSSELL v. ATKINSON.

ASSUMPSIT for work done and materials found by the plaintiff as a builder, in making additions to a house of which the defendant's mother was seised for life, with remainder to the defendant. At the trial, evidence was given of an employment of the plaintiff by the defendant, but it appeared that when work to the value of 30*l.* had been done, the plaintiff received orders from the defendant not to proceed any further with it. The plaintiff thereupon sent to desire the defendant to appoint a surveyor to estimate the value of the work then done, and no answer being returned to this application, he proceeded to complete the work according to the original contract. The cost of the whole of the work amounted to 140*l.*, and for this sum the amount, but recovers only for the work done previously to the countermand. The defendant is entitled (under 43 *Geo. 3, c. 46.*) to costs.

*B.*, a builder, is employed by *A.* in altering *A.*'s house. During the progress of the work *A.* countermands the employment, whereupon *B.* requests *A.* to appoint a valuer, and upon receiving no answer to his application, *B.* continues the work, completes it, and arrests *A.* for the whole

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plaintiff procured the defendant to be arrested. The mother of the defendant had offered in payment her promissory note, or bill of exchange for the whole amount. This, however, the plaintiff refused, contending that the defendant was the party with whom he had contracted, and that he was therefore entitled to look to the defendant for payment. It was not denied that the charges were fair and reasonable. The questions made at the trial were,—1st. Whether it was the defendant or her mother who was liable: and, 2dly. If the defendant was liable to any amount, then whether the plaintiff could claim for work done after the countermand was given.

Verdict for the plaintiff, damages 30*l*.

Sir *J. Scarlett* had obtained a rule, calling upon the plaintiff to shew cause why he should not pay costs under 43 *Geo. 3*, c. 46, s. 3, for having arrested the defendant without reasonable or probable cause.

*F. Pollock* and *Steer* showed cause. The plaintiff having bestowed his labour and supplied materials to the whole amount for which the defendant has been held to bail, upon a contract with the defendant, renders this case unlike those in which the Court has thus interfered. It is clear that he acted bonâ fide, and that he had reasonable and probable cause for the course which he has taken. Although the jury considered that he was entitled to recover only a portion of his demand, he was fully justified in considering that the countermand was waived by the defendant, upon finding that she made no answer to his application for the appointment of a surveyor to estimate the value of his services up to the time of the countermand. This conclusion was strengthened in his mind by the fact of the defendant living in the neighbourhood, and having therefore an opportunity of seeing the work in progress, and yet giving no intimation to the plaintiff that he was proceeding at his

peril. These circumstances were sufficient to shew reasonable and probable cause for the arrest for 140*l*.

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Sir *J. Scarlett*, *contra*, was stopped by the Court.

DENMAN, C. J.—It appears to me that upon the plaintiff's own shewing there is sufficient to make the rule absolute. The mother offered to give him a bill of exchange for the amount, and it was his own folly that he did not take it. After this he cannot be said to have had reasonable or probable cause for arresting the defendant. It is said that the work has been done and the goods furnished for the benefit of the defendant; but I do not think that this consideration ought to affect our decision. The question is, whether there was any reasonable or probable cause for arresting the defendant for 140*l*.

PARKE, J.—It is quite clear that there was here no reasonable or probable cause.

TAUNTON, J.—It is said that the countermand was considered as waived by her. The defendant may not have sent the surveyor, because she considered that she was liable to nothing, and thought that appointing a surveyor would be an acknowledgment of liability.

PATTERSON, J.—It is quite clear that there was a countermand. When a party arrests for a large sum of money, which he knows to be disputed, he must take his chance of being rendered liable to costs in case of its appearing that his claim was not well founded.

Rule absolute. (a)

(a) And see *Ashton v. Nutt*, 3 Moore & Scott, 184; *Amos v. Blofield*, 9 Bingh. 91.

But a plaintiff arresting a defendant under a misapprehension with respect to a doubtful point of

law is not liable to the payment of costs under this statute; *Slavin v. Taylor*, ante, i. 250. *Secus*, where the mistake is not *bonâ fide*, *Raven- gar v. Mackintosh*, 4 Dowl. & Ry. 187; 2 Barn. and Cressw. 693.

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## ROBINSON v. DAY.

Where a new trial is granted upon payment of costs, remanet fees, although incurred before the unsatisfactory trial, are to be paid by the party impugning the verdict.

**AFTER** a verdict for the plaintiff, with 100*l.* damages, in an action for slander, the defendant had obtained a rule absolute for a new trial upon payment of costs. In taxing the costs, the Master allowed *remanet* fees, the cause having stood over from time to time. The Court granted a rule nisi for the Master to review his taxation, against which


*Platt* now shewed cause. The question is, what are the costs which a party is required to pay when a new trial is granted upon payment of costs. Such costs ought to be paid as have been incurred between the point to which he is remitted and the time of obtaining his rule. All that has intervened has been rendered abortive by the fault of the defendant, who omitted to produce a witness to prove a book, and it was upon this ground that the Court granted him a new trial as a boon, but upon the condition that he should reimburse to the plaintiff all costs incurred by him since the parties at the assizes were ready for trial (a).

*F. Kelly*, in support of the rule. Certainly the practice of allowing remanet fees has been recently acted upon in one or two instances. The question is, whether the costs of the former trial only were to be paid, or whether the defendant is also liable to pay for matters long antecedent. It would

(a) If the plaintiff should succeed upon the second trial, the consequence to him of this mode of construing the rule would be, the receiving, with certainty and by anticipation, those costs for which he would have been entitled to issue and execution at the termination of the cause; should the plaintiff fail upon the second trial, he would by this construction receive from the defendant costs which, but for the

mistrial, he would have paid himself. While the result of the second trial is doubtful, the fixing the defendant with the remanet costs is a bonus to the plaintiff. The argument drawn from the facts of the particular case tends rather to shew that the plaintiff was fairly entitled to this bonus, than that the rule should be so construed in all cases, including those where the fault is with the jury only.

be desirable that the practice of all the Courts should be uniform and well ascertained, particularly in a case of so frequent occurrence, and therefore the Court will perhaps inquire of the practice of the other Courts. If there is no fixed general practice, the Court will look to the terms of the rule, which do not appear to embrace any thing more than the costs of the trial. If upon the new trial the verdict should again pass for the plaintiff, he will be entitled to the remanet fees as costs in the cause; if for the defendant, it would be hard that he should have been obliged to pay those fees which would otherwise have been allowed to him. The most common case in which costs are paid upon a new trial granted, is that of a verdict against evidence, where the jury are the only parties in fault. There the successful party not being in fault, the other party must pay the costs as the price of his new trial; but it is difficult to see upon what principle, in such a case, the liability to pay costs can extend to expenses incidental, it is true, to the trial, but no way connected with the finding of the jury. [*Parke, J.* It is best to treat this as a case of a verdict against evidence. *Patteson, J.* Suppose nothing had been said about costs in the rule, these fees would have been costs in the cause.] They certainly would.

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DENMAN, C. J.—It is so important to have the practice of all the Courts alike in this respect, that before we decide we will make inquiries as to the practice of the other Courts.

*Cur. adv. vult.*

DENMAN, C. J. on a subsequent day in the said term, said—In the case of *Robinson v. Day* there was a question whether, where a party obtains a rule for a new trial upon payment of costs, the remanet fees are costs taxable by the Master and to be allowed by him. We are of opinion, upon reference to the Master, that they are to be included

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in those costs, and therefore the rule for referring this case back to the Master must be discharged.

Rule discharged.

**JOHNSON, Assignee of BEARHEAD, a Bankrupt, v. PIPEA.**

In a case with-  
 in the 92d  
 section of the  
 Bankrupt Act,  
 (6 Geo. 4, c.  
 16,) where the  
 assignees went  
 into evidence  
 of the trading  
 in conse-  
 quence of a  
 notice to dis-  
 pute, without  
 adverting to  
 the section or  
 relying upon  
 the deposi-  
 tions, and  
 having failed  
 to establish the  
 trading, were  
 nonsuited, the  
 Court refused  
 to set the non-  
 suit aside.

**ASSUMPSIT** for goods sold and delivered. At the trial before *Denman, C. J.*, at the last Yorkshire assizes, notice had been given by the defendant of his intention to dispute the trading petitioning creditor's debt, and act of bankruptcy, but the bankrupt himself had not, within two calendar months after the adjudication, given notice of his intention to dispute the commission. The adjudication was on the 27th of March, the action was commenced by writ of summons on the 8th of June, and the cause was tried in July; so that more than two months had elapsed between the adjudication and any of the proceedings in this action. The bankrupt was within the United Kingdom at the time of issuing the commission. The proceedings had been inrolled. The defendant, at the trial, called upon the plaintiff to prove the trading, &c. The plaintiff attempted to do so, but failed in proof as to the time down to which *Bearhead* continued to trade. There was no evidence of a trading contemporaneous with the act of bankruptcy (*a*), and the plaintiffs were in consequence nonsuited.

*John Williams* now moved to set aside the nonsuit and for a new trial. The action being for a demand for what the bankrupt himself might have sued, the plaintiff ought not to have been required to prove the commission, the

(*a*) By 6 Geo. 4, c. 10, s. 3, "every such trader doing, suffering, &c. any acts, deeds or matters aforesaid, with intent to defraud or delay his creditors, shall be deemed

to have thereby committed an act of bankruptcy," i. e. every person so trading at the time of his so doing, suffering, &c.—*Vide Rawlinson v. Pearson*, 5 B. & Ald. 124.

bankrupt not having given notice within two calendar months after the issuing of the commission of his intention to dispute it, under which circumstances, by the 92d section of the Bankrupt Act (a), "the depositions taken before the Commissioners at the time of or previous to the adjudication of the petitioning creditor's debt or debts, and of the trading and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained, in all actions at law or suits in equity brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit."

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DENMAN, C. J.—You did not advert to this clause at the trial, but went on to prove the facts. If you had mentioned it, there might have been some answer in fact.

PARKE, J.—It would be very hard upon the plaintiff to give you a new trial in this case, because the clause in the statute admits of several answers, with which, or some of which, the defendant might have been prepared.

TAUNTON, J. and PATTESON, J. concurred.

Rule refused (b).

(a) 6 Geo. 4, c. 16.

(b) Supposing the effect of the 92d section to have been to make the inquiry as to the trading wholly nugatory, and that the assignees

had no power to waive the benefit of the 92d section, still the non-suit would have been justified by the non-production of the depositions.

### DOE d. WHITEHEAD v. PITTMAN.

**EJECTMENT**, tried at the last Gloucester assizes before Tindal, C. J. Verdict for the plaintiff. A question arose whether *Mary Whittle*, who had paid rent to the lessor of the plaintiff, and by whom the defendant was let into possession, had disclaimed the tenancy. The evidence of the

"I have no rent for you because *A. B.* has ordered me to pay none." This is evidence of a disclaimer of tenancy.



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disclaimer was as follows:—*Mary Whittle*, upon being applied to for her rent, said to the person by whom the application was made, "I have no rent for you," and referred him to her daughter, who was in the room, for the reason. The daughter said, "The *Pittmans* have ordered us to pay none."

*Ludlow*, Serjt. in moving for a new trial, submitted to the Court whether this was evidence of a disclaimer.

DENMAN, C. J.—We think it was clearly evidence of a disclaimer. The daughter must be considered as the index of the mother's mind.

Rule refused.

THE KING v. THE SHERIFF OF MIDDLESEX, in the matter  
of WATTS v. HAMILTON.

The Court will, upon payment of costs, set aside an attachment issued against the sheriff upon the rule of court of Hilary term, 3 *Will.* 4, bail having been put in and perfected after the contempt and before the issuing of the attachment.

Where the plaintiff has not declared, he is not entitled to have the attachment against the sheriff for disobedience of a judge's order to bring the defendant into Court, stand as a security.

THE defendant had been arrested on the 2d of June, 1833, upon bailable process returnable in vacation, to which the sheriff returned *cepi corpus*. On the 4th of July notice of bail was given. Exception thereto. On the 15th of July the bail came up to justify, but refused to do so. On the 22d of July, a judge's order issued, requiring the sheriff, within — days, to bring the defendant into Court by forthwith putting in and perfecting bail above to the action. On the 1st of November special bail was put in for the purpose of rendering. On the 4th of November the judge's order was made a rule of Court, and an attachment forthwith issued upon the general rule of Hilary term, 3 *Will.* 4(a). *Holt*, for the Sheriff of Middlesex, had, in the early part of the term, obtained a rule nisi to set aside the attachment; against which

(a) See this rule, *ante*, vol. i. p. 400.

disobedience of a judge's order to bring the defendant into Court, stand as a security.

*Miller* now shewed cause, and contended that the contempt of the sheriff had not been purged by the putting in bail in the meantime, for that the rule of Court, upon which the attachment issued, directs that if the sheriff shall not duly obey the judge's order for bringing the defendant into Court, and the same shall be made a rule of Court in the term next following, an attachment shall issue forthwith for disobedience of such orders whether the bail shall or shall not have been put in and perfected in the meantime.

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 MIDDLESEX.

*Holt*, contra. At the time the attachment issued, the sheriff had completely purged his contempt. [*Parke*, J. The attachment was exactly according to the rule.] The only question is, whether the attachment is to be set aside upon payment of costs or not. There can be no reason why the attachment should continue.

The Court set aside the attachment upon payment of costs.

*Miller* applied for a direction that the attachment should stand as a security.

PARKE, J.—You have not declared in the action, and therefore you are not entitled to have the security of the sheriff.

Rule absolute upon payment of costs.

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GRIFFITHS v. POINTON.

ASSUMPSIT for money lent.

*R. V. Richards*, in last Easter term, obtained a rule warranted in arresting another for a debt of which he has not, *at the time of making the arrest*, some evidence besides his own personal knowledge of its existence; and therefore a plaintiff arresting a defendant for a large sum of money, and having at the time of arrest evidence only as to a small portion of the amount, was held to be liable to costs under 43 Geo. 3, c. 46, s. 3, although at the time of the trial some evidence of a *subsequent* acknowledgment by the defendant was given.

A party is not warranted in arresting another

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calling upon the plaintiff in this action to shew cause why he should not pay costs under the 4S Geo. 3, c. 46, sect. 3, upon affidavits, which disclosed the following facts. The plaintiff, on the 7th May, 1832, caused the defendant to be arrested for the sum of 102*l.* 6*s.* 3*d.*, and the defendant, whilst in the custody of the officer who arrested him, being at the office of the plaintiff's attorneys, gave them 76*l.*, and a bond for the residue of the 102*l.* 6*s.* 3*d.* and costs, saying that he wished to settle the matter, but nevertheless declared that he did not owe the money. Notice was given by the defendant to the plaintiff's attorneys not to part with the bond or to pay over the money, and good bail was put in to the action. This Court, upon application, ordered the money and bond to be placed in the hands of the Master of the Court, and that the defendant should plead, so as to be ready to go to trial at the next assizes. All this was done, but the plaintiff did not proceed to trial at the next assizes; whereupon the Court ordered the money and bond to be delivered to the defendant. At the last Shropshire spring assizes the cause came on for trial before Taunton, J. Two advances of money, amounting together to 14*l.*, were proved to have been made by the plaintiff to the defendant, and as to the remainder of the 102*l.* 6*s.* 3*d.*, the only evidence given was of that which has been stated to have taken place at the office of the plaintiff's attorneys. The plaintiff obtained a verdict for 14*l.* only. The defendant, by affidavit, stated, that he paid the money in dread of going to gaol, but denied that he owed the sum of 102*l.* 6*s.* 3*d.*, or the plaintiff had reasonable or probable cause for procuring him to be arrested for that sum. The plaintiff, in an affidavit in answer, stated, that the defendant had at various times borrowed from him sums amounting to 102*l.* 6*s.* 3*d.*; *that neither he nor the defendant could write*; that no one was present when the sums charged in the particular were lent, except the sums in respect of which he had recovered, and that he had no acknowledgment from the defendant of his having received the money.

*Talfourd*, Serjt., in this term shewed cause against the rule.

*R. V. Richards*, *contra*, was stopped by the Court.

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*Pointon*.

DENMAN, C. J.—This is not a question of malicious arrest, where a party's own consciousness may affect his situation. Here the question is only whether there is reasonable and probable cause. He must at the time of the arrest have reasonable and probable cause for believing that he shall be able to prove the debt at the trial. Here there is no evidence of the debt, except the conduct of the defendant at the attorneys' office. If we were to permit a plaintiff's own view of a case to protect him from the consequences of arresting for a much larger sum than is due, we should make the provisions of this act of little or no avail.

PARKE, J. concurred.

TAUNTON, J.—The question must be taken with reference to the state of things existing at the time of the arrest. I do not, nor does the Court, lay down that the plaintiff must at the time of the arrest be prepared with full evidence of the debt; but here, the plaintiff had at the time of the arrest no evidence at all of the cause of action, and therefore he had not reasonable or probable cause for making the arrest. All the evidence that was given consisted of admissions, or of what was said by the defendant himself at the time when he was under pressure of the arrest, and it turns out that the jury did not believe that even those acts of acknowledgment turned the scale in favour of the plaintiff.

PATTESON, J.—I am entirely of the same opinion. It seems to me that the question turns entirely upon the want of proof at the time of the arrest. I do not mean to lay down any general rule applicable to every case, but I must

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say that a party ought not to arrest without having some evidence of the debt besides his own knowledge. Professional men ought to caution their clients not to take such a step without some kind of legal evidence.

Rule absolute.

—◆—  
 REX v. SPRAGGS, in the matter of SPRAGGS v. WILKS.

Upon a motion for an attachment for nonpayment of costs, pursuant to the master's allocatur, to whom accounts had been referred upon the undertaking of the party, the Court refused to grant a rule absolute in the first instance, and this is the practice of all the Courts.

*PRICE* moved for an attachment against the plaintiff for not paying to an attorney of the Court a sum of money, *the balance of his bill delivered*, pursuant to the master's allocatur. He prayed for a rule *absolute in the first instance*, on the express words of the rule of court (a), and stated that the original bill delivered had been reduced by sums paid and items taxed off by the master upon a reference to him to tax on the plaintiff's undertaking.

DENMAN, C. J.—In the case yesterday, in which a question arose whether this Court will grant a rule absolute in the first instance for an attachment *for nonpayment of costs*, upon an allocatur, where there is a matter of account to settle before the master; we find that the practice of the other Courts agrees with the practice of this Court, of granting only a rule to shew cause why an attachment should not issue. Therefore let there be a rule to shew cause.

Rule to shew cause.

(a) T. T. 17 Geo. 3. (1777), on the master's allocatur, shall be K. B. It is ordered, that the attachment for nonpayment of costs absolute in the first instance.



DOE dem. Sir J. WYLDBORE SMITH, v. BIRD and  
another.

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**EJECTMENT** brought to recover one fourth of several copyhold estates. At the trial of this cause before *Garrow*, B., at the August assizes for the county of Norfolk, in 1829, a verdict was found by consent for the lessor of the plaintiff, subject to the opinion of this Court upon a special case, which stated in substance as follows.

In 1777, Mrs. *Warren*, (then *Elizabeth Southwell*) and her two sisters, *Frances* and *Mary*, were tenants in tail of part of the premises in question, viz. the lands mentioned in the first count in the declaration, and tenants in fee of other part, and also of certain freehold property, the lands mentioned in the second count.

In that year a settlement was made on the intended marriage of *Elizabeth Southwell* with Dr. *Warren*. It was covenanted that the copyhold estates should be surrendered to trustees to certain uses for the benefit of Dr. and Mrs. *Warren*, and the survivor, for life, then for the benefit of the issue of the marriage, if any, and if none, then to the use of such persons as Mrs. *Warren* should by deed or her last will and testament, executed as therein mentioned, notwithstanding her coverture, and as if she was sole and unmarried, appoint, and in default of appointment to the use of Mrs. *Warren* in fee. The freehold estates were conveyed to those uses. No such surrender to the trustees was ever made.

The marriage was solemnized in 1777.

In the year 1779 *Frances Southwell*, the sister of Mrs. *W.*, died intestate, never having been married.

In 1781, Dr. and Mrs. *Warren* executed a power of attorney to *James Guy*, authorizing him to surrender the

Husband alone may make a tenant to the præcipe, in a recovery to be suffered of the wife's land. Such recovery will bind the wife and her heirs, unless reversed within 30 years after coverture determined.

A power of appointing copyholds by will, may be exercised by a will not referring to the surrender creating the power.

A power to appoint by will, notwithstanding coverture, may be exercised by the donees of the power when discovered.

By a devise of his real estate, made before the passing of 55 Geo. 3, c. 192, by a testator seised of freehold and copyhold lands, who makes no surrender, to the use of his will, the copyholds do not pass.

So, although the testator, having made his will before, dies after the passing of the act.

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copyhold lands of which she was tenant in tail, to *Humphry Watts*, in order to make him tenant to the præcipe in a recovery intended to be suffered. *Mrs. Warren*, previously to her executing the power of attorney, was examined apart from her husband by the steward or deputy steward of the respective manors. Recoveries were suffered in the courts of the respective manors, in which *William Clarke* was the demandant, *Humphry Watts* was the tenant, and Doctor and *Mrs. Warren*, by *James Guy* their attorney, were the vouchees. Immediately afterwards *William Clarke* surrendered the premises to the same uses as were specified in the marriage settlement.

In the same year, 1781, and in 1782, Dr. and *Mrs. Warren* surrendered the copyhold lands of which she was seised in fee to the same uses.

In the year 1790 *Mrs. Warren* was admitted to certain other copyhold lands in fee, of which no surrender was afterwards made.

In the year 1800 Dr. *Warren* died, never having had issue.

On the 1st of December, 1802, *Mrs. Warren* made her will, duly executed, and thereby devised all her real estates, and also all her leasehold estates, to certain trustees upon the trusts therein mentioned. By a codicil bearing even date with her will, *Mrs. Warren* revoked the above devise, and "as to the rest and residue of her real estates, and also as to all her leasehold estates," devised the same to her sister *Mary* for life, with remainder to the lessor of the plaintiff and another person in fee.

*Mrs. Warren*, at the time of executing her will, had also freehold estates.

1816, *Mrs. Warren* died, leaving her sister *Mary* surviving, who died in 1825.

The court rolls of the different manors were searched, and only one instance of a recovery suffered by a feme covert, by attorney, was found; but there were many instances in which recoveries had been suffered by attorney (a).

(a) This case was argued in Trinity term last.

*Preston*, for the plaintiff. The case branches itself into two parts, the first of which relates to the entailed lands, in the first count; the other to the lands not entailed, in the second count.

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I. As to the entailed lands. The recoveries suffered in the customary courts by Mrs. *W.*, jointly with her husband, were valid. It will be said that a customary recovery in a copyhold manor cannot be suffered by attorney, unless authorized by some particular custom. But assuming that the recovery is not regular, it is only voidable, and not void in law, and neither this nor any other Court at Westminster has power to try its validity. The lord of the manor is chancellor and judge of his own Court, and if there be error, the appeal must be to him. This is laid down by Mr. *Watkins* (a); and it was so decided by the House of Lords in the case of *Ash v. Rogle*, and *Dean and Chapter of St. Paul's* (b). The objection is not tenable, since it goes to the extent of denying that a common recovery can be suffered by attorney, without an express custom, so that whether parties are male or female, married or unmarried, if they should happen to be abroad or ill, so that they could not travel to the Court, there would be a failure of justice, arising from accidental circumstances. This point once arose at nisi prius in *Wymer v. Page* (c), where it was decided, that "an attorney may be appointed for the purpose of suffering a recovery of copyhold lands, as of common right, unless there be an express custom to the contrary." Lord *Ellenborough* said, he thought this point too plain to be reserved; but leave was, however, given to Mr. *Abbott* to move, if he thought the point capable of argument. [*Parke, J.* There is evidence enough in this case, of the custom to appoint an attorney, if that were necessary. The difficulty is, whether a feme covert can appoint an attorney.] This will, perhaps, be admitted. After this decision the act of 47 Geo. 3, s. 2,

First point.  
Validity of  
recovery.

Recovery  
voidable.

Appearance in  
customary  
court by  
attorney.

Appearance of  
feme covert by  
attorney.

(a) 2 Wask. Copyh. 23.

Abr. 119; and see *Watkins* on

(b) 1 Vernon, 367; 1 Eq. Ca. Copyholds, 156.

(c) 1 Starkie, N. P. C. 9.



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cap. 48 (a), passed to enable common recoveries to be suffered in copyhold or customary courts by attorney. This might be before the act passed. It was thought necessary also to pass another act, applicable to recoveries to be suffered by attorney in Courts of ancient demesne (b); but this was clearly unnecessary, as appears from the books. At common law, long before any statute was passed on the subject, a party who could shew that he was unable conveniently to appear in person, might cast an essoign by his servant, and when once he had appeared in Court per responsalem, as it is called, the demandant, in a writ of right, might proceed and get judgment. The whole of the chapter on Essoigns, in *Bracton* (c), proceeds upon this assumption. And the first section of the 13th chapter, which is entitled "Qualiter essoniatus venire debet ad turrin London, et quando, vel mittere responsalem" shews that this was the mode of proceeding (d).

And it would be singular enough if this were not so; because otherwise if the writ were brought against a man who was abroad, his lands might be taken into the hands of the party by the grand or petit cape (e). The only question has been in such cases, whether the party had been duly constituted responsalis. Nothing is to be found in all the books which contravenes this authority as applied to copyhold manors. Afterwards came the various statutory regulations, by which it is provided, that only persons duly qualified, and entitled to practice as attorneys, should appear to either of the processes that are issued out. If this had been an adverse proceeding against Dr. and Mrs. *Warren*, unless they could name some one to appear for them, they would have lost the land by default, even although this was the property of a married woman. If the instrument would have been sufficient to authorize an attorney to defend an adverse action, it may surely be regarded as sufficient to authorize the

(a) *Wymerv. Page* however was decided in 1814, (34 *Geo. 3.*)

(b) 59 *Geo. 3. c. 80.*

(c) Fol. 334, b. *Ed. 1569.*

(d) Fol. 359, a. *Ed. 1569.*

(e) *Com. Dig. Process (D. 4.) (D. 5.)*

suffering of a common recovery, which is a common assurance. The husband may appoint an attorney for his wife, and in some particular cases the wife may apply to the Court to enable *her* to appoint an attorney for herself to defend her interests (a). In the Common Pleas, when a common recovery is suffered, a writ of *dedimus potestatem de attornato faciendo* is granted, to take the examination and acknowledgment of the parties, and this is the form of the proceeding: "*A., B., and C. his wife*, put in their place *C. D. to be their attorney against D. E., to gain or lose in a plea of land.*" In an adverse action this is the only preliminary proceeding. But where a common recovery is suffered, *by the rules of the Court*, and not by any act of parliament, it is requisite that commissioners should examine the wife apart from her husband, and return a certificate to the Court. In this case all has been done which the rules of Court require. In each manor Court there is a letter of attorney executed by the wife, authorizing a surrender of the premises. This letter of attorney, which the wife could understand, may surely be considered as solemn and binding as if the surrender by her had been taken by the steward, especially when it is considered that the recovery is for her benefit, and enlarges her power. It is admitted that a married woman cannot make a deed; but it is submitted that this instrument sufficiently testifies to the customary court, that the wife consented to the suffering of the recovery. By 9 & 10 *Will. 3.* no common recovery can be reversed or avoided for any defect, unless the suit for reversing such recovery be commenced within 20 years after the suffering of the recovery. The lord, therefore, after the lapse of 20 years, cannot be called upon to falsify this recovery. The lord's court is the proper jurisdiction to try the validity of this recovery. In *Viner's Abridgment*, there is no instance in which an objection has been raised to a recovery, that it was suffered by attorney; and in *Viner's Abridgment*, title *False Judgment* (b), it is said, "But copyholders of land in ancient demesne, at the

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(a) *Vide* Com. Dig. title *Receipt* (A. 3.)

(b) (B) pl. 10.

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will of the lord, *must sue by bill in the lord's court*; and shall make protestation to sue there in the nature of what writ he will. But though false judgment be given, he shall not have writ of false judgment at common law." The judgment in *Holland v. Jackson* (a) establishes also that the lord's court is the proper place to try this question. In an anonymous case in *Dyer* (b), upon a writ of false judgment, one objection was, that the tenant, who was under 21, had appointed an attorney; but there never has been a case in which it has been objected that the husband and wife made an attorney.

Then as to the effect of Mrs. Warren's will. The objection to the will as to part of the property devised is, that there was no surrender to the uses of the will; and as to other part of the property, that Mrs. Warren had a power, and that as the will contains no reference to that power, it cannot operate as an execution of it.

Surrender to  
uses of will  
rendered un-  
necessary by  
55 Geo. 3,  
c. 192.

As to the latter objection, it is submitted that 55 Geo. 3, c. 192, which renders a surrender to the uses of a will unnecessary, provides, not for the state of the ownership at the time of making the will, but for the state of the ownership at the time of the death of the testator. It is admitted by the plaintiff, that previously to the passing of this statute, if a party had made a will, and devised his copyhold property specifically, yet unless he had made a surrender to the use of his will, the copyholds would not have passed. The object of the statute was, that from thenceforward no person should be under the necessity of making a surrender in order to give effect to his testamentary intentions. The statute makes the will effectual, "although no surrender shall have been made to the uses of the last will and testament of such person, as the same would have been if a surrender had been made to the uses of such will." It may be urged on behalf of the defendant, that if this construction is adopted, the general words in this will will be applied to copyholds,

(a) Bridgm. Rep. 69.

(b) T. T. O' Ellis, fol. 262, b.

although the testatrix had freehold land to satisfy the words of the will. In *Doe v. Ludlam* (a), the chief justice, after reviewing all the authorities on this subject, held that this statute puts the testator precisely in the same condition as if he had made a surrender to the use of his will. Any other construction would render the act nugatory; for where general words were used by a testator having freeholds and copyholds, before the copyhold can pass, they must have been surrendered to the use of his will.

As to the second objection, that the power was not exercised; the right of disposition possessed by Mrs. Warren was not a *power* in the strict sense of the word, but it was a species of modified ownership. The doctrine of powers is foreign to copyhold lands. In strictness the law does not recognise a *power* in copyholds. If this case had arisen before the Statute of Uses, the right of disposition would have been treated and called a restricted ownership, and that statute can make no difference. Supposing the will did not exercise the restricted right of disposition, it would operate on the fee limited, subject to the exercise of that right of disposition.

*Follett*, contra. There are different grounds of objection to the plaintiff's right to recover, in reference to different properties which are the subject of this case. The lands in the first count are lands held in tail; the lands in the second count the plaintiffs take as coparceners in fee. The lessor of the plaintiff has no right to the lands comprised in the second count of the declaration, except under the will of Mrs. Warren; and then the question is, whether Mrs. Warren had any power to dispose of the lands; and that turns on the question whether there was any valid recovery suffered by her, because if there was no valid recovery there was no power of appointment. Then with respect to the lands mentioned in the first count of the declaration, there is this further difficulty, viz. that as the lands were surrendered to certain uses which she was to appoint, her will is

(a) 7 Bingh. 275; 5 Moore & Payne, 48.

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a valid execution of the power; and there is also this objection, that the general words used in the will disposing of all her real estates will not pass copyhold lands. This objection also applies to the lands in the first count. [Denman, J. For the present you had better apply your attention to the first objection.] The words used are general words disposing of all her real estate. By this devise the copyholds will not pass, since there is no reference to the power, and the devise does not profess to be in execution of the power.

First point.

Then as to the question whether a valid recovery has been suffered. There was no valid recovery, not for the reason supposed on the other side, but because there was no valid surrender, and, consequently, no good tenant to the *præcipe* (a). This is not an error in form which the law may correct. The surrender for the purpose of making a tenant to the *præcipe*, is a surrender by power of attorney executed by Dr. Warren and his wife, and the attorney had no power to make a valid surrender. Authorities have been cited for the purpose of shewing that if there be an error in form it must be decided by the lord in his own court. This may be so in cases where it is necessary to reverse a recovery; but that is not the case here. By 10 & 11 Will. 3, cap. 14, the time in which a recovery can be reversed is limited to twenty years. This statute does not apply where there is a *bad tenant to the præcipe*. The statute only takes effect where there has been an *error in the proceedings*. *Roe v. Baldwere* (b) shews that this Court will deal with a recovery of copyhold lands in the same manner as they would with freehold. A great many old authorities have been cited for the purpose of shewing that parties may appear by attorney. It is not disputed that a recovery may be suffered by attorney, or that parties may

(a) Though a recovery of a copyhold is not suffered upon any writ of *præcipe quod reddat*, the tenant to

the *plaint* is often, though incorrectly, called tenant to the *præcipe*.

(b) 5 T. R. 104.

give a power of attorney for the purpose of making a surrender, provided the party be competent; but Mrs. Warren was not competent to make this power of attorney. Then it was said, suppose an adverse real action had been brought against Dr. Warren and his wife, and they had not appeared, the land of the wife might have been seised; that is not the case here. In *Holland v. Jackson* the point was, whether the appearance in an action by a feme covert was any ground of reversal; but that is not the ground taken here. What is contended for is, that the power of attorney for the purpose of making a valid surrender cannot be given by a married woman. In *Watkins on Copyholds* (a), it is said, "husband and wife may together surrender the wife's lands; she being on such surrender examined apart by the steward, though such steward be only by parol, and that without any special custom to warrant. So a steward may depute another to take such surrender and to examine the feme covert. In a subsequent page (b), it is said, "a person non compos, under coverture, or an infant, cannot make an attorney by the common law, nor can they be enabled by custom." In some cases indeed an attorney may be appointed by the husband for himself and his wife, but that cannot be done in the present instance. The wife must, on her surrender, be separately examined by the steward, to prevent the coercion of the husband; this would be frustrated by his appointment of an attorney, for a person cannot be examined by deputy. By 9 Geo. 1, cap. 29, s. 1, a feme covert may make an attorney for the purpose of admission to copyholds, and by 47 Geo. 3, sess. 2, cap. 8, for the purpose of suffering a recovery of them. If a feme covert could appoint an attorney in the way which has been done here, these statutes, passed to authorize a feme covert to appoint an attorney, would have been unnecessary.

The 10 & 11 W. 3, c. 14, which limits the reversal of a recovery to twenty years, does not apply where there has been no good tenant to the præcipe. This statute was

(a) Vol. i. p. 63.

(b) Ib. p. 66.

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made for the purpose of limiting the time within which a writ of error should be brought for the reversal of a fine and common recovery, or an adverse judgment. This is apparent from the 14 *Geo. 2*, c. 20, s. 5, which was passed for the preventing recoveries from being set aside, in consequence of losing the means of evidencing the making a tenant.

Second point.

Under the original surrenders which are set out, there is a limitation to the right heirs of *Henry Southwell*; and it is contended that, inasmuch as at the time when the will was made, *Mrs. Warren* was the customary heir of *Henry Southwell*, she had the ownership in fee in the remainder, which would pass by her will; and therefore it is contended that it is unimportant whether the recovery was valid or not. This raises the point with respect to the lands mentioned in the first count of the declaration, as to the power of appointment; whether the general words "all my *real* estate," would be sufficient to pass copyhold estates. The words of the power of appointment are, "to the use of such person, for such estate as *Elizabeth*, the wife of the said Doctor *Warren*, by any deed &c., or by her last will, should, *notwithstanding her coverture*, and *as if she were sole and unmarried*, appoint."

Power to be  
exercised dur-  
ing coverture.

The first objection is, that the power<sup>(a)</sup> could not be executed when *Mrs. Warren* ceased to be a feme covert. The will is dated in 1802, when *Mrs. Warren* was in her widowhood. There does not appear to be any decision upon this point. [*Denman*, C. J. Surely it is only meant that her coverture shall not stand in the way of any exercise of the power.] This is not very material.

Non execution  
of power by  
general devise.

The substantial objection is, that the will is not an exercise of the power, because there is no reference to it in the will, and the devise is general "of all her estate," and there are other estates to satisfy the devise. It is said that this is not, properly speaking, a *power*, but a *modification of the ownership*. Whatever it be called, the same rule will apply. The only question is, did *Mrs. Warren* intend to avail herself of the right of disposition which she possessed? [*Parke*, J. re-

(a) *Ante*, 679.

ferred to *Doe d. Hickman v. Hickman* (a)]. *Driver v. Thompson* (b), shews that the will could not be a valid execution of the power. Then the question arises, whether or not, under the devise of "all my real estate," the copyholds pass, *Mrs. Warren* at the time having also freehold estates. It is not necessary to impugn the decision in *Doe v. Ludlam*, although it has been a good deal canvassed. The cases which have been decided, with respect to leasehold estates, are applicable. In *Rose v. Bartlett* (c), it was held "that if a man hath lands in fee and lands for years, and deviseth all his lands and tenements, the fee simple lands pass only, and not the lease for years: and if a man hath a lease for years and no fee simple, and deviseth all his lands and tenements, the lease for years passeth; for otherwise the will should be merely void." The authorities are collected in *Powell on Devises* (d). In *Chapman v. Hart* (e), it was said by Lord *Hardwicke*, "Suppose a case (which, though I do not know to be determined, I should not doubt to determine so) of a person seised of freehold and copyhold in D., who surrenders to the use of his will, and devises all his lands and tenements in D. to a child, there being a surrender, both freehold and copyhold would pass, if the will was duly executed according to the statute of frauds: but if no surrender to the use of the will, only the freehold would pass; to which lands and tenements generally mentioned shall be applied, there being no surrender to the use of a will to shew a different intent." The case which Lord *Hardwicke* states not to have been determined, has since been decided in *Sampson v. Sampson* (f). In *Hartly v. Hurle* (g), the general doctrine was acquiesced in by the Court. *Powell* says (h), "he is not aware that it has ever been expressly decided that the rule in *Rose v. Bartlett*, excluding leaseholds where the devisor has freeholds, applies where he has freeholds at

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(a) *Ante*, vol. i. 780; 4 Barn. & Adol. 56.

(b) 4 Taunt. 294.

(c) Cro. Car. 292.

(d) Vol. ii. p. 127.

(e) 1 Vez. sen. 272.

(f) 2 Ves. & B. 337.

(g) 5 Ves. 540.

(h) 2 Pow. Devises, 137.



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the time of the will, but not at his death; so that *in event* the devise had nothing but leaseholds to operate upon: but there can be no difficulty, it is conceived, even in the absence of decision, in confidently asserting that the rule extends to such a case; inasmuch as it is the intention of the testator at the period of *making the will*, which is the point to be ascertained, and which cannot of course be evinced by subsequent events." *Doe v. Ludlam*, and 55 Geo. 3, c. 192, have been referred to (a). If it was the intention of the party, at the time of making the will, not to pass the copyholds, that intention cannot be altered by the passing of the act. Equity will supply the want of a surrender in favour of a wife, child, or creditors, where there is a specific devise of copyhold; but not where the devise is of all the real estate, and the testator has freeholds and copyholds. The Courts of Equity act upon the principle in the latter case, that because the copyholds were not surrendered by the testator to the uses of his will, it was not his *intention* to devise them. This was the rule before the passing of 55 Geo. 3, and that statute can make no difference. [*Parke, J.* Suppose the copyholds were, after making the will, surrendered to the use of the will, you admit they would pass]. The surrender would amount to a republication of the will, *Heylyn v. Heylyn* (b). All the cases go upon the principle of intention, and that the surrender shews an intention to devise: *Byas v. Byas* (c), and the other cases collected in *Powell on Devises* (d). The statute only did away with the defect of a surrender, it cannot be contended that the statute would make the copyholds pass, whether the testator intended it or not. In *Doe v. Bartle* (e), the Court decided that the statute only supplied the want of a formal surrender. The cases which have been determined since the passing of the statute, shew that it is the intention of the party which is to govern the construction, *White v. Vitty* (f). In *Doe v. Ludlam*, the will was made since the statute, and

(a) *Suprà*, 684, 5; *infrà*, 695.(b) *Cowp.* 130.(c) 2 *Veaz. sen.* 164.

(d) Vol. ii. p. 121, note (r)

(e) 5 *Barn. & Ald.* 492.(f) 2 *Russell*, 484.

if the remarks of *Tindal*, C. J., as to the intention, are taken to apply to what was the intention at the time of the making of the will, that case is an authority for the defendant. There is one other case decided since the passing of the statute, *Wentworth v. Cox* (a), which is in conformity with the previous cases. The present case comes precisely to this point, which has been very frequently decided, viz. that where there has been no surrender to the use of a will, the Court will not presume an intention of passing copyholds unless the will would otherwise be inoperative. There has been no surrender in this case, and therefore it was not the intention of the testatrix that the copyholds should pass. If that be so, the passing of the statute ten or fifteen years after the making and publishing of the will, would not supply an intention which did not originally exist. The object of the legislature was not to defeat the intention of the testator, where it really was his intention not to pass the copyhold. [*Denman*, C. J. The words are, "And as to all the rest and residue of my real estates, and also as to all my leasehold estates whatsoever." Might not the mention of the words "leasehold estates," in contrast with the words "real estates," import that the testatrix intended to pass *all* the property over which she had a right of disposition.] The leasehold estates would not pass under the general devise. But it does not follow that the testatrix intended her copyhold estates to pass, which she had not surrendered to the uses of her will.

*Preston*, in reply. The only objection to the recovery is, that there was no good tenant to the præcipe. The husband in this case was seised in right of his wife, and without the concurrence of the wife could make a good tenant to the præcipe. *Sir John Robinson v. Comyns* (b) is an authority for this position, which is fully established.

This brings the case to the question, whether the language of the will is sufficient to pass copyholds. Here there are two descriptions of property, part which was not

(a) 6 Madd. 363.

(b) Cases temp. Talbot, 164.

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comprised in the surrender to the uses of the will, and which was not surrendered; and other part which has been surrendered. If a person has an equitable estate in copyhold lands, and in his will uses general words, the copyhold lands will pass, because the testator has the power to give them. If the testator happen to be seised of the legal estate, then in such a case the copyhold land will not pass without a surrender, because the party has not at law a power without surrender to dispose of them. If the testator having the legal estate, however, makes a surrender, then the land does pass, because he has at law the power to dispose of them. The rule at law therefore is, that by the general words in a will, "real estate," copyholds will pass if the testator has at law the power of disposing of them. *Mrs. Warren* had the right of disposition.

It is said that it requires express language to exercise the right of disposition. The testatrix acquired the right to make a will with the intention of exercising it. By her will she has disposed of all her real estate, and as the copyhold property is a portion of the real estate, it will be unjust to prevent the copyhold from passing. It has been said that she had only a right of disposition whilst she was covert; but a dispensation from one disability cannot operate as imposing another. It is not contended that *Doe v. Ludlam* has *in terms* decided this case; but it decides this, that the words of the act are sufficient to enable the Court to read the will as if there had been a surrender to the uses of the will. If, subsequently to the making of the will, and to the passing of the statute, the testatrix had gone to the steward of the manor for the purpose of making a surrender, she would have been told that it was unnecessary.

The words of the act are, "Every disposition or charge made, or to be made, by any such last will and testament, by any person *who shall die after the passing of this act*, of any such copyhold tenements, shall be as effectual to all intents and purposes, although no surrender shall have been made, as it would have been if a surrender had been made." It was never intended to give effect to wills of persons who

had died before the passing of the act. The plain meaning of the act is, that every will made by a person who should die *after the passing of the act*, concerning his copyhold lands, should be as valid as if he had made a surrender to the uses of his will. The legislature has done that for the parties which otherwise they would have been obliged to do for themselves. [*Littledale, J.* The third section seems rather against that, for it says, "That nothing herein contained shall be construed to render valid or effectual any devise or disposition of any copyhold lands which would be invalid or ineffectual if a surrender had been made to the uses of a will."] The meaning of that clause is, that nothing is dispensed with except the making of a surrender. Unless the statute was intended to apply only to wills already made, why was there a reference to the persons who should die after the passing of the act? The legislature thought it was better to give effect to wills without a surrender, than to oblige the public to make surrenders to the use of their wills. Besides the act in terms refers to wills *made, as well as to wills to be made.*

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*Cur. adv. vult.*

DENMAN, C. J. in the course of this term delivered the judgment of the Court. The Lord Chief Justice, after stating the facts as above (a), proceeded as follows:—

Upon this state of facts three questions were raised in argument.

First, Whether the recovery suffered in 1781 was valid.

Secondly, Whether Mrs. *Warren's* will was a valid execution of the power contained in the surrenders made in the years 1781 and 1782: and,

Thirdly, Whether Mrs. *Warren's* will was sufficient to pass the lands to which she was admitted in 1790, having been made before the passing of the 55 Geo. 3, c. 192, although she died subsequently to that act.

With respect to the first question, it was objected that

(a) *Suprà*, 679.

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First point.

the recovery was void, because a married woman could not, previously to the 47 *Geo. 3*, sess. 2, c. 8, appear and suffer a recovery by attorney, and because there was not a good tenant to the plaint, inasmuch as the power of attorney to *James Guy* was void as regarded *Mrs. Warren*, who was then a married woman; and inasmuch as her husband could not appoint an attorney for her, for the purpose of making a surrender.

It was answered, that a recovery suffered by a married woman by attorney, is at all events not void, but voidable only by petition to the lord; and that the statute 10 & 11 *Will. 3*, c. 14, limits reversal of recoveries to 20 years, which period has long elapsed; and that there was a good tenant to the plaint, because, admitting that the power of attorney was void, as the act of *Mrs. Warren*, and that her husband could not appoint an attorney for her for the purpose of surrender, (as is expressly laid down in *Watkins on Copyholds(a)*,) yet that the power of attorney was valid as the act of *Dr. Warren*, and that the husband has such an interest in his wife's copyhold lands, as that he may pass them by surrender during the joint lives of himself and his wife, though such a surrender will not operate as a discontinuance of his wife's estate.

We are of opinion that this is the true answer to the objection; that the act of the husband was sufficient to make a good tenant to the plaint; and that the recovery, not having been reversed within 20 years, is good.

Second point.

With respect to the second question, it was objected, that the will was not a good execution of the power contained in the surrenders of 1781 and 1782, for two reasons; first, because it does not refer to the power nor the subject of it; and secondly, because the power extends only to the period of *Mrs. Warren's* coverture, whereas the will was made after she became a widow.

It is true that the will is in general terms, and does not refer either to the power or the subject of it; it is also true

(a) Vol. i. p. 65.

that there is other property upon which it would operate; but in regard to copyholds, such a clause in a surrender is not strictly a power, but a mode of rendering the lands devisable; and it is not essential that the will should refer to the surrender; *Marwood's case* (a). Then as to the time of the execution, we are of opinion that the power is not restricted to the time of *Mrs. Warren's* coverture. The words are not *during* her coverture, or *whilst* she shall be covert; but *notwithstanding* her coverture, and as if she were sole and unmarried; they were plainly intended to enable her to make a will whilst married as if she were sole, but not to *disable* her if she should actually become sole.

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A clause in a (covenant to) surrender, authorizing cestui que trust to devise, not strictly a power.

With respect to the third question, there is more difficulty. In *Doe d. Clarke v. Ludlam* (b) it was held, that copyholds would pass under general words in a will made *since* 55 Geo. 3, c. 192, although there had been no surrender; but it does not follow that they will pass under such words in a will made *previously* to the statute. We have not found any authority upon the point; but looking to the state of the law previous to the statute, and to the words of the statute, we are of opinion that this will is *not* a disposition or devise of the copyhold lands to which *Mrs. Warren* was admitted in 1790, and, therefore, that the statute does not cure the want of a surrender. The words of the statute are, "that in all cases where, by the custom of any manor in England or Ireland, any copyhold tenant of such manor may, by his or her last will and testament, dispose of or appoint his or her copyhold tenements, the same having been surrendered to such uses as should be declared by such last will and testament, every disposition or charge made or to be made by any such last will and testament, by any person who shall die after the passing of this act, of any such copyhold tenements, or of any right, title, or interest in or to the same, shall be as valid and effectual to all intents and purposes, although no

Third point.

(a) Cary, 36. (b) 7 Bingh. 275; 5 Moore & Payne, 48; *ante*, 684, 5.

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surrender shall have been made to the use of the last will and testament of such person, as the same would have been if a surrender had been made to the use of such will." If the will had contained an express devise of copyholds, no doubt this statute would have applied to the present case, for the words are "made or to be made," or if there had been an implied devise of copyholds, the same consequence would have followed. But if there be neither the one nor the other, and if the legal effect of the words of the will be to raise the presumption, that the testatrix at the time of making the will intended the copyholds *not* to pass, the statute cannot alter that presumption and supply a different intent. Now it has been established by a long series of cases prior to the statute, that general words in a will are not to be applied to copyholds which have not been surrendered to the use of the will, if there be freehold lands on which they can operate; because the absence of a surrender shews that the testator intended that they should not be so applied. It follows, that when this will was made, it was not a disposition by will of the copyholds not surrendered; and neither the statute nor any thing that has happened since can alter the fact, and make it such a disposition. The case of *Doe v. Ludlam* rests on a totally different ground; for there the will was made since the statute, and it seems clear that the statute, by rendering a surrender unnecessary, has done away with the presumption as to the testator's intention arising from the absence of a surrender.

Upon the whole, therefore, we are of opinion that the lessor of the plaintiff is entitled as to all the lands, except those to which *Mrs. Warren* was admitted in 1790, and that as to those the defendant is entitled.

Postea to the plaintiff.



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TAPLEY and another v. WAINWRIGHT.

**TRESPASS** for breaking and entering the close of the plaintiff called the Croft, and a certain other close of the plaintiff, in the parish of Bunbury, in the county palatine of Chester. Plea: first, not guilty: secondly, that the said several closes in which &c. now are, and at the time when &c. were, and from time whereof &c. have been respectively parcels of a certain common piece of waste ground called Bunbury Common; and that the defendant was seised in fee of a messuage and land, in respect of which he prescribed in a que estate for common of pasture: wherefore he entered &c., and because the closes in which &c., at the time when &c., were wrongfully inclosed, separated and divided from the residue of the common, with the gates, hedge and fences in the said declaration mentioned; so that as he could not otherwise fully enjoy his common of pasture there, he broke the gates &c. Replication: as to the second plea, (protesting that the said closes in which &c. were not parcels of the said piece of ground, and also protesting that the defendant had no right of common in the said waste ground,) that *the said closes in which &c. were not wrongfully inclosed, separated, and divided from the residue of the said common, but, on the contrary thereof, the said closes, continually for twenty years and more before the said time when &c., had been, and at the time when &c. were inclosed &c. from the residue of the common called Bunbury Common, and occupied and enjoyed all that time in severalty and adversely to the defendant and all those whose estate he had, without any entry therein made for or relating to the said supposed common of pasture. The rejoinder traversed the enjoyment in severalty during twenty years.*

Declaration for trespasses in Whiteacre. Plea: that Whiteacre is part of a waste called Dale, over which the defendant had common appurtenant by prescription. Replication: that Whiteacre had been inclosed and severed from the waste, and held adversely to the commoners for twenty years. This replication is maintained by evidence that *part* of Whiteacre had been inclosed twenty years, and *part not*; and that the alleged trespasses were committed in *both parts*.

On the trial before *Bosanquet, J.* at the Chester spring assizes 1832, it appeared that the alleged acts of trespass had been committed over the whole surface of a close, by destroying the crops growing thereon. Of this close nine-



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tenths had been inclosed from the common, and held adversely as against the commoners, for more than twenty years. The residue had been inclosed for a shorter period. A verdict was found for the plaintiff, liberty being reserved to the defendant to move to enter a nonsuit. A rule to this effect having been obtained,

*J. H. Lloyd*, in Easter term, shewed cause. It is a well-established rule that a plaintiff in trespass may apply the trespasses to any part of the locus in quo mentioned in the declaration. The case of *Hawke v. Bacon (a)* was cited in moving for a nonsuit. There the replication was precisely in substance, and very nearly in form, the same as here; but it is submitted that the judgment of the Court in that case can hardly be supported in its whole extent. It is there said that if the defendant had taken issue on the replication, and any part of the close named in the replication had been inclosed less than twenty years, the issue must have been found for the defendant; and it is said that it did not differ from the common plea of liberum tenementum, where, if the defendant prove that he has a single acre in the vill, the issue is with him; and that if the plaintiff had meant to dispute the particular spot, he should have new-assigned. Now with regard to the plea of liberum tenementum, that plea is an anomaly, and the analogy on which the judgment rests cannot be supported. The effect of the plea of liberum tenementum has been much narrowed: *Cocker v. Crompton and others (b)*. There it was held in trespass for breaking and entering the plaintiff's close called the Fold Yard, to which the defendant pleaded a plea of liberum tenementum generally, that the plaintiff was not bound to new assign, and that he might recover upon proving a trespass in a close in his possession bearing the name given in the declaration, even though the defendant showed that he had a close in the same parish known by the same name. Indeed if this

(a) 2 Taunt. 156.

(b) 2 Dowl. & Ry. 719; 1 Barn. & Cressw. 489.

were otherwise it would be a great anomaly; for in all other cases the defendant who pleads a justification is bound to make out every part of it. As in the common case of a plea of prescription, if the defendant fail in any part, the plaintiff recovers. Here, however, the defendant has not pleaded *liberum tenementum*. If he had, the plaintiffs might have new-assigned. As the pleadings stand it must be considered that the trespasses were committed in various parts of the whole close, one small portion of which has been inclosed less than twenty years. The plaintiff may if he pleases rest his case upon the trespasses on the part which has been inclosed twenty years. In *Richards v. Peake* (a) the issue was upon the allegation in the replication, that the close in which &c. was a close known by the name of Burgey Cleave Garden, and that the same had been inclosed for thirty years, and separated from the common. A verdict having been given for the defendant, upon the ground that part of the close had been inclosed within thirty years, and that the trespass was committed exclusively on that part, the Court held the finding good, and discharged a rule for setting aside the verdict. *Holroyd, J.* said that the allegation might be considered either as an entire or a divisible allegation, that is, either as including the whole of Burgey Cleave Garden, or as confined to that part of it upon which the trespass was committed: that if it was entire, the plaintiff was bound to prove that the whole had been inclosed thirty years; and if divisible, then it became a question of fact whether the trespass had been committed upon the part which had been so long inclosed: that it seemed to him that it ought to be treated as a *divisible* allegation, and that the jury had done

(a) 4 Dowl. & Ry. 572; 2 Barn. & Cressw. 918. In that case the evidence at the trial clearly shewed that trespasses had been committed as well in that part of Burgey Cleave Garden, which had been inclosed less than twenty years as in that part which had been in-

closed for a longer period; and that point (upon which, indeed, no question was raised at *nisi prius*) was *not* submitted to the jury. The Court, however, felt itself bound by the report of the learned judge, in which the facts were stated as above.

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right in finding their verdict for the defendant on that issue. So here, conversely, the jury would not have done right if they had not found for the plaintiff, a trespass having been proved to have been committed on a part of the close which had been long enough inclosed. So in *Bassett v. Mitchell* (a), though the decision was there also for the defendant, yet all the arguments used by the Court are in favour of the present plaintiff, and shew that the words "the close in which &c." are applicable to any part of the land, within the bounds stated in the declaration, on which the plaintiff might shew a trespass actually committed. [*Littledale, J.* That case is very like the present.]

*John Williams and J. Jervis, contra.* The issue tendered by the plaintiff is too wide, and is not supported by the evidence. He should have newly assigned. The analogy to the new assignment upon a plea of liberum tenementum, which is alluded to in *Hawke v. Bacon*, arises thus: The plaintiff admits in the one case, that part is the freehold of the defendant, but part not; and says, in this case, that part has been inclosed within 20 years, but part not. It is his duty to confine the issue to the part which is his freehold, or which has been inclosed more than 20 years. The plaintiff in this case ought to have taken care to tender an issue of such dimensions as would be consistent with his extent of right of separate enjoyment, and to exclude a plea which embraces the whole of a piece of land, part inclosed within 20 years, and part not. There should have been a nolle prosequi as to all that part of the common which had been inclosed less than 20 years, and the part which the plaintiff meant to rely on should have been set out by metes and bounds. This is shewn by *Richards v. Peake*.

The doctrine laid down in *Hawke v. Bacon* is expressly recognized in the last edition of *Saunders* (b).

If the plaintiff is not driven to point out the spot that he has inclosed within 20 years, the commoners may be misled.

(a) 2 Barn. & Adol. 99.

(b) 1 Wms. Saund. 299. b (c).

DENMAN, C. J., in Trinity term, 1833, delivered the judgment of the Court. After stating the pleadings and the evidence, his lordship proceeded thus :—

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The pleadings may be considered as if one close only were mentioned. The plea admits the trespasses in that close, but justifies them on the ground that at the time they were committed, the close was still part of the common in point of law. The replication admits that it was so (a), but insists that the commoners' right of entry was taken away by an adverse possession of 20 years, according to the doctrine laid down in the case of *Creach v. Wilmot* (b). The question on these pleadings is, whether, in order to maintain this issue, the plaintiff must prove that every part of the close had been separated and divided for that time. We are of opinion that he need not. The words, "the said close in which &c." have been settled by the cases of *Richards v. Peake*, and *Bassett v. Mitchell and Smith*, to mean only the particular place in which the trespasses complained of were committed. Therefore it is clear, that upon the issue in this case the plaintiff need not have proved that more than the parts actually trespassed upon, (and which the defendant must be understood to have known when he pleaded to them,) were inclosed 20 years.

Whether the plaintiff is bound to prove that *all* the parts trespassed upon were inclosed for that period, depends upon the question, whether this is a divisible allegation.

Now it is clear that, on the general issue, the plaintiff, though he may have meant to insist on trespasses over the whole of a piece of ground described by name or abutments, and may have given evidence of trespasses upon the whole, will be entitled to recover pro tanto, though the jury should find that some only were proved. In the declaration, therefore, the term "close" is a divisible allegation. It seems

(a) i. e. the replication, by protesting that the close in which &c. was *not* part of the said piece of ground, admits, for the purpose of the present action, that the

locus in quo remained part of the piece of ground called Bunbury Common, though no longer subject to commonable rights.

(b) 2 Taunt. 160 n.

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highly reasonable that the same rule should prevail in the replication. The plaintiff, ~~when he avers~~ in it that ~~the~~ close in which &c. was inclosed for 20 years, means the same thing as if he had averred that the trespasses complained of in the declaration were committed in places, each of which had been inclosed 20 years; and if he succeeds in proving that some of the trespasses were so committed, and some not, why should he not recover for those which were?

The case is analogous to an action for goods sold and delivered, to which there is a plea of infancy, and a replication that the goods were necessaries. If the plaintiff on the trial should prove that part only were necessaries, there would be no question as to his right to recover for that part. As in the allegation in the *declaration*, the plaintiff need not prove a sale of *all* the goods he alleges to have sold, so in the *replication* he need not prove *all* to have been necessaries. It appears, therefore, to us, that in this case the plaintiff ought to recover *pro tanto*.

No doubt the parties will agree to apportion the damage found for trespasses upon the whole space, and to reduce the amount so as to be a fair compensation for the trespasses to the part inclosed for 20 years. This will avoid the necessity of a new trial.

If the defendant requires it, the verdict will be entered for the plaintiff as to part, and the defendant as to other part, of the close in which &c., and if our judgment be wrong, the objection will be on the record.

Our decision is at variance with the dictum (a) of the Court in *Hawke v. Bacon* (b), which, after much consideration, we think is not founded on sufficient reason, and not supported by the analogy to the pleas of *liberum tenementum*, on which it appears to have been founded.

Rule discharged.

(a) See the observations of *Littledale, J.* upon this dictum, in 2 *Barn. & Adol.* 10; and see

1 *Wms. Saund.* 268, 9, in *notis.*

(b) 2 *Taunt.* 157.

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HARRISON and another v. WARDLE and others.

**DEBT**, by assignees of a replevin bond against the distrainee and his sureties. The declaration, after alleging the distraining of the goods of *Wardle* for rent by the now plaintiffs, the levying of the plaint by *Wardle* in the County Court of the Sheriff of Staffordshire, the bond, the condition of the bond(a), the delivery of the goods to *Wardle*, the levying of the plaint by *Wardle*, and the removal of the plaint by recordari facias loquellam, issued at the instance of *W.*, returnable in Michaelmas term 1829, alleged, as a breach of the condition of the bond, that *Wardle* " did not prosecute his said suit in the said Court of our Lord the King before the King himself *with effect and without delay* against the said plaintiffs in this suit, for taking and detaining the said goods and chattels, nor hath he further prosecuted such suit, nor did he make a return of the said goods and chattels, according &c. The declaration then stated the assignment of the bond to the plaintiffs.

Plea: first, that by the re. fa. lo., the sheriff was commanded to record the plaint, to have the record at the return of the writ in the King's Bench, and to prefix the same day to the parties, that they might be ready to proceed in the plaint; that at the return of the re. fa. lo. *Wardle* came into the said Court of our said Lord the King,

(a) Which stipulated in the ordinary form, that *Wardle* should appear in the next County Court, and should then and there prose-

cute his action with effect and without delay, and that he should make a return of the goods, if a return should be awarded.

In an action on a replevin bond conditioned to prosecute with effect and *without delay*, it is a sufficient breach of the condition that the plaintiff in replevin *did not use due diligence* in the prosecution of the suit.

But where the plaint was removed by re. fa. lo., and the plaintiff in replevin appeared, and the defendant not, held that subsequent delay is not a breach of the bond even though the sheriff should have neglected to summon the defendant as directed by the re. fa. lo.

*Semble*, that the assignees of a replevin bond, are not estopped from replying a

fact contrary to the sheriff's return to the re. fa. lo. (b).  
*Quere*, Whether there can be a breach of a condition to prosecute *with effect* before action determined.

(b) As the sheriff himself would be estopped, and an estoppel binds *privies* as well as parties, and as the bond was assigned by the sheriff after the return by which he

had estopped himself, it would appear that the Court considered that the right of action vested in the plaintiffs *by the statute*, and not *by the sheriff*.

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First plea:  
Non appear-  
ance of de-  
fendants in re-  
plevin on day  
prefixed by  
sheriff.

before the King himself, and was then and there ready to proceed with his said suit, and to prosecute the same with effect and without delay, against the now plaintiffs, according to this condition, but that the now plaintiffs came not and did not appear in the said Court of &c.; that the sheriff returned the writ; that he had prefixed the same day to the parties that they might be there ready to proceed in the said plaint; that *Wardle* was always ready and willing to prosecute his said action with effect, and without delay, against the now plaintiffs, and would have so prosecuted his said suit against the now plaintiffs, if they had appeared in the said Court of &c., according to the exigency of the said writ of re. fa. lo., but that the now plaintiffs did not nor would appear in the said Court of &c. on the day so prefixed to them by the sheriff for that purpose, or at any other time.

Second plea:  
Non appear-  
ance of de-  
fendants in  
replevin after  
summons by  
sheriff on day  
prefixed.

Secondly, that in pursuance of the said writ the sheriff recorded the plaint, prefixed a day for the parties to appear, and summoned the now plaintiffs to appear in K. B. to proceed in the said plaint; and that on the day prefixed by the sheriff, *Wardle* appeared, and from thence during the continuance of the suit was ready and willing to prosecute and would have prosecuted his said suit with effect and without delay, against the now plaintiffs, but that they did not nor would appear in the said Court on the day so prefixed to them by the sheriff.

Demurrer and  
replication.

Special demurrer to the first plea, stating as cause, "That it does not appear in or by the said plea that the defendants have fulfilled the condition of the said writing obligatory, or that the said suit is still depending, or that it has ever in any manner ended or determined; and that it does not appear by or in the said plea that any summons, notice or process has been issued to compel the now plaintiffs, or either of them, to appear according to the exigency of the re. fa. lo. Joinder in demurrer.

To the second plea the plaintiff replied, by taking issue on the summons.

To the replication to the second plea, the defendants

rejoined, that the sheriff, before the bond was assigned, and at the return of the writ, returned to the Court of K. B., that he had caused the plaint to be recorded; that the sheriff had the record in Court on the day in the writ named; *and that he prefixed the same day to the parties to appear*, that they might proceed in the said plaint. Wherefore the defendants prayed judgment, if the plaintiffs, as assignees of the sheriff, ought to be admitted against the said return and the record thereof, to plead the said replication.

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Rejoinder by  
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pel.

General demurrer and joinder (a).

*R. V. Richards*, for the plaintiff. The pleas are not sufficient to bar the plaintiff of his right to sue upon the bond. It was the duty of the obligor to set the cause in motion. He was bound not only to appear but also to declare: *Complete Sheriff*, 75; *Dalton's Sheriff*, 168. In *Brackenbury v. Pell* (b), the declaration was upon a bond conditioned to be void if the defendant should prosecute her suit with effect. Breach: that she did not prosecute with effect. The defendant pleaded, first, that she had prosecuted with effect: secondly, that she had prosecuted her suit, which was still depending and undetermined. Replication: that the defendant had wholly abandoned her suit, and that it was not still depending; to which the defendant demurred. The Court gave judgment for the defendant; and then the question turned entirely upon the meaning of the expression, that the defendant had *abandoned* her suit. In *Axford v. Perrett* (c), it was held to be a breach of the condition of a replevin bond to prosecute *without delay*, where the plaintiff in replevin allowed two years to elapse without taking proceedings. It is said in *Morgan v. Griffith* (d), "In all replevin bonds there are several independent conditions, one to prosecute, another to return the goods replevied, and a third to indemnify the sheriff; and a breach may be

(a) This case was argued in Easter term before Denman, C. J., Littledale, J., and Parke, J. (c) 4 Bingh. 585; S. C. 1 Moore & Payne, 470. (d) 7 Mod. 380.

(b) 12 East, 585.



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assigned upon any one of these distinct parts of condition." In this case there is a sufficient breach if the defendant has not prosecuted *without delay*. In *Gwillim v. Holbrook*(a), where the condition of the bond was to appear at the next county court, and there prosecute the suit with effect, it was held that the condition was not satisfied by prosecuting at the next county court; but that if the plaintiff was removed by re. fa. lo. into a superior court, the plaintiff must prosecute *there* with effect. In *Turnor v. Turner*(b) it was held, that the condition to prosecute with effect was broken by the plaintiff in replevin becoming nonsuit. So also in *Vaughan v. Norris*(c).

*Follett*, contra. The plaintiff in replevin has done all that he was bound to do. All the authorities, with the exception of *Axford v. Perrett*, shew that the action will not lie unless the replevin suit has been put an end to. When the plaintiff in replevin sues out a re. fa. lo, it is the duty of the sheriff to summon the defendant. The sheriff returns that he has summoned the defendant. If the return be false, the defendant has an action against him. Upon the return being made, the defendant is bound to enter an appearance, and until this is done the plaintiff cannot declare: 2 *Archb. Prac.* 78. If either the plaintiff or the defendant wishes to expedite the process, he *may* compel the other to appear; but the plaintiff is not *bound* to compel the defendant to appear. The plaintiff has done all that was required of him, and if the suit has been delayed, it has been through the negligence of the now plaintiff himself. [*Parke, J.* The plaintiff is bound to prosecute with effect. In order to do this he must do all that is necessary to bring the suit to a successful termination. He must take steps to compel an appearance. There are many authorities to shew that the plaintiff is bound, if the defendant do not appear, to sue out a pone per vadios, distringas, and alias and pluries

(a) 1 Bos. & Pull. 410.

Brod. & Bingham. 107.

(b) 4 B. Moore, 486; S. C. 2

(c) Cases, temp. Hardw. 137.

distringas: *Tidd's Practice*, 417 (a) ]. The defendant is bound to appear, and has not done so. The plaintiff may compel him to appear, but is not bound to do so.

All the cases cited are consistent to shew that the plaintiff must have obtained a legal determination adverse to the plaintiff. In *Brackenbury v. Pell*, to a declaration on replevin bond, alleging a breach of the condition to prosecute with effect, the defendant pleaded, that the suit had been instituted by her, and was still pending and undetermined; and Lord *Ellenborough*, C. J. in his judgment, said, " It lay, therefore, upon the plaintiffs to shew that it was legally determined, so as to establish the breach alleged, that it was not prosecuted with effect." The meaning of the condition is, that the plaintiff shall prosecute with *success*, and that if he fail of success in the action, then the bond is to be put in suit. In the *Duke of Ormond v. Bierly* (b), *Holt*, C. J. says, " This was a prosecution with effect, because there was neither a nonsuit nor a verdict against *E. G.*; and so it is upon a recognizance on a writ of error, which is also to prosecute with effect: if the plaintiff is not nonsuit, nor the judgment affirmed, the recognizance is not forfeited." Until the suit is determined, non constat that the suit may not terminate in favour of the plaintiff in replevin. The course in replevin is this. Goods are seized; the party replevies, and gives a bond, binding himself to prove his right to replevy; and until the suit be terminated, it cannot be known whether he has this right or not. It is for the now plaintiffs to shew that the tenant has failed to prove his right to replevy. In *Norris v. Vaughan* and *Turnor v. Turner*, the suit was determined. It is not contended that the bond does not apply to proceedings in the superior Court. In *Axford v. Perrett*, the county clerk said, that after three courts had elapsed without any proceedings being had, the cause, by the practice of the county court, was out of court; and this Court said, " That after the time which had elapsed without any proceedings, the replevin cause, by analogy to the practice of the higher tri-

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(d) 9th edk.

(b) Carthew, 519.

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banals, was out of Court." In that case an appearance must have been entered. It cannot be said in this case that the suit is not depending, for the party may now enter an appearance, and the action may proceed. The only delay that has occurred is delay on the part of the present plaintiffs, who ought to have appeared, and have yet the power of appearing.

*Richards*, in reply. The condition of the bond is to prosecute with effect and without delay. *Axford v. Perrett* appears to have been decided upon the latter part of the condition, and shews that in order to establish a breach of this part of the condition, the suit need not be determined. The obligor by his bond undertakes to act, and is bound to force the cause to a determination. But whatever steps ought to be taken by the obligor, this is clear, that in the present case the suit has not been prosecuted without delay: *Perreau v. Bevan* (a).

The judgment of the Court was delivered (b) by

DENMAN, C. J., who, after stating the pleadings, proceeded as follows:—On the argument before us (c), it was contended that the plaintiffs had shewn no breach of the condition of the bond, because the suit was still continuing; and it was said, that there could be no breach unless there were a judgment for the defendant in replevin; and an authority was cited to this effect from *Carthew*, 519. But in that case the question did not arise upon a breach assigned for not prosecuting *without delay*; and if any effect is to be given to those words, it seems impossible to say that if the plaintiff in *replevin* does not use due diligence in its prosecution, the condition is not broken; and the opinion of the Court in the latter part of the judgment in the case of *Axford v. Perrett* is to the same effect.

The question then is, whether it sufficiently appears upon the pleadings that there *has* been a delay on the part

(a) 8 Dowl. & Ry. 72; 5 Barn. & Cressw. 284.

(b) In Trinity term, 1833.

(c) In Easter term.

of *Wardle*. It is said there has been none, because the plaintiffs are estopped by the sheriff's return from saying that they were not summoned; and if they were summoned, it was their own fault, and not *Wardle's*, that the action was delayed. But it is difficult to say that the sheriff would be estopped by his return in this action, which is not between the same parties as that in which the return was made; and if he be not, the plaintiffs certainly are not concluded by this return. Admitting, however, that the plaintiffs are not thus concluded, and that upon the replication to the second plea it is to be taken that the plaintiffs were not summoned at all, still it appears in both pleas that the writ of recordari, which was sued out at the instance of *Wardle*, contained a direction to the sheriff to prefix a day to the parties, which is in effect a direction to summon the plaintiffs; and we think that the defendant, *Wardle*, was not responsible for the default of the sheriff, or guilty of delay in the suit, if the sheriff neglected to serve it. On this ground it appears to us that the defendants are entitled to judgment.

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Judgment for the defendants.

DAVIES v. WATSON and BROUGHTON.

**ASSUMPSIT** for money had and received to the plaintiff's use. At the trial before *Denman*, C. J. at the London sittings after Michaelmas term, 1832, the following facts appeared. One *Moses*, who resided out of London, being indebted to the defendants in 42*l.* 6*s.* for professional and *B.* accepts the bill in this form, without giving notice to *C.* or providing for the payment of the bill at *C.'s* house. *A.* negotiates the bill, which upon becoming due is presented by the holder to *C.*, who paid it under the supposition that the bill so presented was another bill of a different amount and date, drawn by *B.* on and accepted by himself, and did not discover his mistake until a fortnight afterwards, when the other bill was presented. *B.* becomes bankrupt:—Held, that *C.* could not recover against *A.* in an action for money had and received.

But *semble* that if *A.* himself had received payment as holder of the bill: for his misconduct in making the bill payable at *C.'s* house he would have been liable.

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business, they drew a bill upon him for the amount, and in order that it might be negotiable in London, they drew it payable at the house of the plaintiff, who was a friend and correspondent of *Moses*. *Moses* accepted it in this form, but made no provision for its being paid at the plaintiff's house; neither had the plaintiff any notice of the fact. The bill being negotiated by the defendants, it came into the possession of the Bank of England, and on the 17th October, 1830, the day when it became due, a clerk from the Bank called at the house of the plaintiff, and presented the bill, which was not then paid. The clerk left a ticket, as is usual, containing the particulars of the bill; and the plaintiff supposing it to be a bill drawn by *Moses*, which he himself had accepted, but which was for a different amount, and was not due until a fortnight afterwards, without looking into the matter, gave directions to his clerk to take up the bill. This was accordingly done, and the bill was laid aside. On the 2d November, when the bill accepted by the plaintiff became due, it was presented, and the amount, 34*l.* 12*s.*, was paid by him. Then, and not till then, the plaintiff discovered that he had paid the former bill under a mistake, and applied to the defendants to refund the money so paid. They refused to do so (except upon a condition which failed). *Moses* afterwards becoming a bankrupt, the present action was brought against the defendants. It appeared in evidence that the defendants had received from *Moses* 10*l.* on account of the bill. For the defendants it was contended, upon the authority of *Cocks v. Masterman* (a), that the money having been paid by mistake, with a full knowledge, or the means of full knowledge of the facts, could not be recovered, unless timely notice had been given of the mistake, so that the defendants could not have been damaged by reason of it. It was urged on the part of the plaintiff, that this did not come within the ordinary rule, as in this case the mistake would not have been made but for the defendants' impropriety of conduct in drawing the bill payable at the plaintiff's

(a) 4 Mann. &amp; Ryl. 676; 9 Barn. &amp; Cress. 902.

house, without his permission and without notice. The jury thought the defendants had so drawn the bill, without authority from the plaintiff, and therefore, under the direction of the learned Chief Justice, found their verdict for the whole amount of 42*l.* 6*s.* In the following term *Busby* obtained a rule nisi to reduce the verdict to the sum of 10*l.*, which had been, as above stated, paid upon account.

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*F. Pollock* and *Cresswell* now shewed cause, and contended, as at the trial, that the plaintiff was entitled to the whole amount upon the facts found by the jury. They admitted that if there had been only negligence on the part of the person seeking to recover the money paid under mistake, he would be precluded from recovering, upon the authority of *Cocks v. Masterman* (a); but that the misconduct on the part of the defendants, by which the plaintiff was misled, took the case out of the general rule; and for this the language of *Abbott, C. J.* in delivering judgment in *Wilkins v. Johnson* (b), and the case of *Jones v. Ryde* (c), were relied on.

*Busby*, contra, contended that the finding of the jury was a finding of law, or at all events of an immaterial fact; that the negligence on the part of the plaintiff was gross, and that by it the defendants had been deprived of the opportunity of using due diligence in getting the bill paid by *Moses*; that the rule was well established by *Bilbie v. Lumley* (d), and *Brisbane v. Dacres, executrix* (e), that money paid under mistake, with full knowledge, or means of full knowledge, of the facts, cannot be recovered. [*Patteson, J.* If the plaintiff had seen the bill, and had afterwards paid it, it could not have been contended that he was entitled to recover, because that would have been a deliberate loan to *Moses*.] The banker's ticket, it is submitted, had the same effect.

(a) 4 Mann. & Ry. 676; 9 Barn. & Cress. 202. (c) 5 Taunt. 488.  
(b) 5 Dowl. & Ry. 403; 3 Barn. & Cress. 428. (d) 2 B. & C. 469.  
(e) 5 Taunt. 143.

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DENMAN, C. J.—If the defendants had sent their own clerk, and he had received the money from the plaintiff, the case might have admitted of doubt; but as they did no more than they were authorized in doing by paying it to the bankers, and the bankers only did their duty in presenting the bill and receiving the money, I cannot think that there is any ill conduct on the part of the defendants. I think the circumstance of the bills having been negotiated makes a difference in this case, and that the plaintiff cannot recover beyond the 10*l*.

LITLEDALE, J.—If the defendants had sent their clerk, it might have made some difference; but as all was done in the regular course of business, I think there is no ground for saying that the plaintiff can recover.

PARKE, J.—If the defendants had themselves sent to the plaintiff, and had received the money, I own I should have had great doubt upon the point. If *Moses* had given a draft upon the plaintiff, and the plaintiff had paid it, this would have been a loan to *Moses*, and the plaintiff would not have recovered against the defendants. Substantially this case is the same, and it comes within the principle of *Smith v. Mercer*(a). It appears to me that the defendants never have received the money from the plaintiff. They were not the holders of the bill at the time of its payment, for the Bank of England did not hold as *agents* of the defendants.

PATTESON, J.—It seems to me quite clear that the bill being in the hands of the Bank of England, it must have been by some indorsement to them; and therefore they were holders of the bill on their own account, and received the money for themselves, and not as agents of the defendants.

Rule absolute;

(a) 6 Taunt. 76.

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The Bailiffs, Assistants, and Commonality of GODMAN-  
CHESTER v. PHILLIPS.

**TRESPASS** for breaking and entering the plaintiffs' In trespass for breaking and entering the close, called the West Common, at Godmanchester. close of the Corporation of G., the defendant's pleas set out an act for inclosing common lands in B., which recited that the Corporation, as lords of the manor, were owners of the soil, and other persons were proprietors of lands over which rights of common were

Plea: first, not guilty. Secondly and thirdly, justifications under prescriptive rights of common.

Fourthly, justification under a right of common, claimed by virtue of 43 Geo. 3, c. 3, (not printed,) intituled "An Act for inclosing certain open and common fields, meadows, lands, commons, and commonable places, within the parish of Gumecester, otherwise Godmanchester, in the county of Huntingdon."

The act (after reciting that there were within the parish of Godmanchester certain open and common fields, meadows, lands, commons, and commonable places, common exercised; the commissioners were directed to make certain allotments to such lords and proprietors, and it was enacted that they should set out as a common of pasture, out of certain commons in G., called the East and West Commons, such plots of land as should be full compensation for the rights of common of all the owners and proprietors of commonable messuages, for such messuages only; and that such plots of land should be used, stocked, and enjoyed by such owners and proprietors, and their respective tenants and occupiers of the said messuages only, as a common of pasture, in such manner as the commissioners should direct. Parties dissatisfied, to bring actions within 3 months against the persons in whose favour award made, or appeal within 6 months to the sessions against the award; but in default of such action or appeal the award to be final.

The Commissioners allotted a plot of ground in the West Common as common of pasture, to be used, stocked, and enjoyed by the owners and proprietors of commonable messuages, and their respective tenants and occupiers of the said messuages only, having right of common upon the said common in G., and they stinted the common as empowered by the act. The Commissioners also (inter alia) allotted lands to the Corporation in respect of their interest as lords of the soil in G.

The right of common had always been, up to the time of passing the act, in the occupiers of commonable messuages, being freemen of G.

After the act, a party, being the proprietor and occupier of one of the commonable messuages, but not being a freeman of the borough, put his beasts upon the common.—Whereupon the Corporation brought trespass against him more than 6 months after the passing of the act.

Upon demurrer, the Court held that the act did not change the nature of the rights of common, by giving them to owners of commonable messuages, who were not burgesses; and that therefore the commissioners had no power to create such new rights. And they held that the language of the award had no other effect than to ascertain the spot on which the right was to be exercised, without altering the nature of the right; and that the action was therefore well brought, though more than 6 months had elapsed since the making of the award.



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taining 4,600 acres, and also reciting that the *plaintiffs, as bailiffs, assistants, and commonalty of Gumcester, otherwise Godmanchester aforesaid*, were lords of the manor of Godmanchester, and as such claimed the soil within the said manor, and that certain persons were owners and proprietors of all the common fields, meadows &c. intended to be inclosed) appointed commissioners and a surveyor for valuing, allotting, and setting out &c. the common fields &c.

The commissioners were authorized and required to adjudicate upon any dispute which might arise between any of the parties claiming to be interested in the said division and inclosure, touching any matter or thing relating to the said divisions and allotments.

The commissioners were required to allot unto and for the said bailiffs &c. and their successors, as lords of the manor, a certain proportion of the said lands within the said parish intended to be inclosed, as a full compensation for all their rights and interests &c. as lords of the manor, in and to the soil of all the waste or known common lands within the said parish; other allotments were directed to be made to owners of meadows over which other persons had partial rights of common, and to others having rights of common.

The commissioners were authorized to inclose the whole, or such part of such meadows as they should think proper. But for the full enjoyment of such part of the said meadows which should be left uninclosed, the said commissioners were authorized by their award to stint and ascertain the number and sorts of cattle to be fed and depastured by the proprietors of commonable messuages and lands in the said meadows, and the times when the feeding and depasturing should begin and end.

Proviso and enactment, that the commissioners should set out &c. as and for a common pasture, out of and from certain commons in Godmanchester, called the East and West Commons, such plots of land as should be a full compensation for the rights of commons of all the owners of commonable messuages or cottages, for such messuages or

cottages only, as well on the said commons as on the said meadows and common fields within the said parish; which plots of land should be held, used, stocked, and enjoyed by such owners or proprietors, and their respective tenants and occupiers of the said messuages and cottages only, as a common pasture, in such a manner as the commissioners should in and by their award direct and appoint.

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Proviso and enactment, that in case any persons interested in the intended division and allotment should be dissatisfied with any determination of the commissioners touching any claims, rights, or interests in, over, or upon the lands thereby directed to be divided, allotted and inclosed, such persons were authorized to proceed to a trial at law of the matter so determined by the said commissioners, at the then next or at the following assizes for the county of Huntingdon, and for that purpose such persons so dissatisfied should, upon giving notice to the commissioners of their intention to bring such action within one month after such determination of the commissioners should be made, cause an action to be brought upon a feigned issue against the persons in whose favour such determination should have been made, within three calendar months next after the determination of the commissioners should be so made.

Feigned issue.

Proviso, that the determination of the commissioners, touching such claims of right to the soil of the said commons and waste grounds, or other rights or interests in, over, or upon the lands and grounds thereby directed to be divided &c., which should not be objected to, or which being objected to, such action at law should not be brought and proceeded in, should be final and conclusive upon all parties, provided that nothing in the said act contained should authorize the said commissioners to determine the title to any messuages or cottages, lands, tenements, or hereditaments whatsoever.

Otherwise,  
award to be  
final.

Enactment, that if any persons should think themselves aggrieved by any thing done in pursuance of that act,

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except such orders and determinations of the commissioners as were therein directed to be final, and except in such cases where an issue at law should be tried as thereinbefore mentioned, they might appeal to the quarter sessions.

The act saved the rights of those to whom no allotment should be made in respect of such rights.

The fifth plea, out of which and the subsequent pleadings the first question arises, alleged that the defendant, before and at the time when &c., was seised in his demesne as of fee, of a certain messuage, being one of the commonable messuages mentioned in the act of parliament; and that before and at the time of making the act of parliament, the owner and proprietor thereof for the time being had a certain right of common of pasture in, upon, and throughout a certain common called the West Common. And after referring to the act of parliament, the plea stated the award of the commissioners, of the date of the 29d June, 1809, by which award the commissioners did set out, allot, and award common of pasture, to be used, stocked, and enjoyed by the owners and proprietors of commonable messuages and cottages, and their respective tenants and occupiers of the said messuages and cottages only, having right of common upon the said common known by the name of the West Common, unto the owners and occupiers of the commonable messuages and cottages, and their respective tenants or occupiers of the said messuages and cottages, having right of common upon the West Common, one plot containing 171 acres, bounded &c., and did give directions as to the time of turning on cattle, and also as to the number of cattle to be turned on. Averment: that the said plot of land, being the said close in which &c., was part of the said common called the West Common, and that the said messuage of the defendant was mentioned in the schedule to the award as one in respect of which the owners or occupiers might use stock, or enjoy the said plot of land, being the close in which &c. as a common of pasture, in the manner directed by the commissioners in the award. And

that by virtue of the act of parliament, and of the award, the defendant being seised, and the occupier of the messuage had, and still of right ought to have, a right of common in and over the close in which &c., and then justified the trespasses.

The sixth, seventh, eighth (a), ninth and tenth pleas varied from the fifth in particulars upon which no question arose.

The plaintiff joined issue upon the first, and took issue upon the three following pleas.

Replication to the fifth plea, that at the time of making the act of parliament, the owner and proprietor of the defendant's messuage had no other or different right of common of pasture in, upon, and throughout the said common called West Common, than in respect of his being a *freeman of the borough* of Godmanchester, and occupier of the said messuage, and not in respect of his being occupier only of the said messuage. And that the defendant at the time when &c., was not nor is a freeman of the said borough.

To the five remaining pleas there were nearly similar replications, to which the defendant demurred generally.

Rejoinder to the replication to the fifth plea: that the owner and proprietor of the said messuage, before and at the time of making the act of parliament, had not a right of common of pasture in, upon, and throughout the said common called the West Common, in respect of his being a freeman of the borough of Godmanchester aforesaid, in manner and form &c. Conclusion to the country.

General demurrer, and joinder.

*Biggs Andrews* in support of the demurrers to the replications. The question to be determined is, whether it can now be inquired what was the peculiar nature of the

(a) In the eighth plea the defendant prescribed antecedently to the act for common appurtenant to a messuage for the owners, being


*freemen*, but did not allege that he was a freeman, relying upon the inclosure act and the award as dispensing with that condition.

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rights of common which existed at the time of the passing of the act; inasmuch as the issue tendered by the replications is immaterial, unless such inquiry can now be made. It is submitted that it cannot; for that by the award of the commissioners, new and ascertained rights are substituted for those which existed formerly. It will be contended on the other side, that the right of common is in the *freemen* occupiers of certain messuages. This question came before the Court of Common Pleas in *Phillips v. Maile*(a), in which *Tindal*, C. J. said, "we are of opinion that the original right of common, for which a new right has been substituted by the act, was not intended to be traversable, except in the way prescribed by the act. It would occasion extreme inconvenience if we were to hold otherwise, and enable parties to put off the time of disputing claims till all evidence in support of them has probably been lost." *Bosanquet*, J. delivered a judgment in that case to the same effect. [*Parke*, J. The argument on the other side will be, that the commissioners by the act of parliament are merely to set out a piece of ground for all those persons who *previously* were entitled to rights of common.] Before the act was passed the right of common might be latent, i. e. there might be an occupier of one of the commonable messuages who was not a freeman. The commissioners are authorized by the act to allot a piece of common for the use of all the owners of commonable messuages. The defendant was the owner of a messuage to which rights of common were attached, although, as he was not a freeman, the right was latent. It is probable, that as the commoners were prejudiced by the diminution of the commonable land, the legislature intended to benefit them, by giving them rights of common, without obliging them to take out their freedom. The award of the commissioners gives the right to the *owners*, not to the *owners being freemen*. The vice of the argument on the other side is, that it calls for the admission of parol evidence to shew

(a) 7 Bingham 146; 4 Moore & Payne, 770.

what the original rights of common were, when the act of parliament is in terms clear and precise. Parol evidence on a subject of this nature is inadmissible. *Tinney v. Tinney* (a), the *Countess of Rutland's* case (b), and the other cases collected in *Phillipps on Evidence* (c). The subject-matter was open to the commissioners to adjudicate upon. They had the West Common, the rights of the commoners therein, and the messuages to which the right of common was attached, under their jurisdiction. They have decided upon all these matters, and if the corporation were dissatisfied, they should have proceeded in the way pointed out by the act of parliament: they should either have disputed before the commissioners the title of persons not being freemen to enjoy rights of common, or they should have appealed against the award. The lords of the manor have no right to *enter* upon the portion of the common allotted to the commoners. If the right of common is to be restricted to the occupiers of messuages being freemen, there might be no freemen, and no one would have a right to use this common.

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*F. Kelly, contra.* There are two questions to be considered in this case; first, whether the commissioners, by the act of parliament, have power to allot rights of common to a totally different class of persons from those who, previously to the passing of the act, possessed it; secondly, assuming that the commissioners were invested with such a power, whether they have exercised it. The act contains no recital of the right of common being vested in any one. Before the act was passed the commoners were required to be freemen as well as occupiers of certain messuages; and it is clear that the act only enabled the commissioners to give compensation for existing rights. The whole power given to the commissioners was, to inquire who had commonable messuages and rights of common, to ap-

(a) 3 Atk. 8.

(c) Vol. i. 348, 3th edit. 1855.

(b) 5 Co. Rep. 25, b.

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point some land as common in lieu of West and East Common, and to direct the manner in which the new common of pasture should be stocked. All that was to be done was to change the *spot* over which the rights of common were to be exercised, and to direct the mode in which they were to be exercised, but they had no power to alter the *qualification* of the commoners. It would have been an injustice to the lords of the manor to have admitted a new and more numerous class of persons to take common on their soil, without giving them compensation for the abridgment of their rights; and no compensation is given. *Place v. Jackson* (a) shews that nothing less than clear and express words will lessen or derogate from the rights of the owner of the soil. It is true that the act gives an appeal against the decision of the commissioners, and a power of trying any question in dispute, by means of a feigned issue within certain limited times. But this question had not then arisen; as it was not until many years after the making of the award that this messuage came to be occupied by a person who was not a freeman. *Philips v. Maile* is distinguishable from this case. The question was not distinctly brought to the notice of the Court, and the decision proceeded upon an assumption of a fact which does not exist here. *Tindal*, C.J. there says, "inasmuch therefore as the plaintiff's right was *capable of being litigated at the time of making the award*, and was never then contested, how are we to say the award was not final?" The claim in this case was *not* capable of litigation at the time of the making the award.

Assuming that the commissioners *had* the power, have they exercised it? The plain meaning of the award is this:—"We award the land to be enjoyed in a certain manner *by such as now have a right of common*." But supposing the language of the award to be obscure, the Court will be inclined to construe it so that it shall not derogate from the rights of the owner of the soil, *Thorpe v. Cooper* (b).

(a) 4 Dowl. & Ryl. 318. (b) 5 Bingh. 116; 2 Moore & Payne, 245.

There is no instance in which an inclosure act has given to commissioners a power to change the qualification of commoners.

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*Biggs Andrews*, in reply. To the argument that the words of the act are to be construed strictly, because otherwise they would derogate from the rights of the owners of the soil, the answer is, that an allotment was directed to be made to the owners of the soil, as a *compensation* for their interest. [*Littledale, J.* The lord has a species of double interest; he has an interest in the soil itself, and has also a right to the residue of the common(a), after the commoners have exercised their right.] The rights of the commoners were certainly to be diminished in some respects, as the commissioners are directed to allot some *portion* of West Common for the use of the commoners(b); whereas previously to the passing of the act the commoners had a right to use the *whole* of West Common. The commoners could not have an equivalent for this right, unless they were benefited in some other way. It has been suggested that the right of the owner of this messuage could not have been litigated at the time the award was made. That was not so. The party whose name was placed in the schedule was an infant under age, and with his guardian the corporation could have tried the question now in dispute(c). Supposing, however, there was no person with whom the question could have been tried, it was a question proper for an appeal, as the corporation were aggrieved by the award. From the language of the act, it would appear that it was intended that from thenceforth the test of title to a right of common should be, the occupation of a commonable messuage. *Philips v. Maile* is in point; the pleadings are in substance the same. The Court will

(a) q. d. "a right to the residue of the vesture of the land over which the right of common extends."

(b) *Ante*, 714.

(c) See the provision respecting feigned issues, *ante*, 715; and quære, whether the *guardian* would have been a competent party to such an issue.



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lean here to that construction of the act of parliament which will tend most to quiet the possession.

DENMAN, C. J., in Trinity term, delivered the judgment of the Court. After minutely stating the pleadings, the Lord Chief Justice thus continued:—

This rejoinder has been demurred to. No special causes of demurrer are assigned, but we think the rejoinder bad, because it does not deny (*a*) any allegation in the replication.

The plea alleges that the defendant, at the time of the act, had a right of common in respect of being owner and occupier of the messuage. Then the replication is, that at the time of the passing of the act the defendant had no other right of common than as being a freeman of the borough and occupier of the messuage, and not as occupier only. Now this tenders an issue, which the defendant might have accepted, concluding to the country. Instead of doing this the defendant says that the owner of the house had not any right of common *in respect of his being a freeman*. This allegation, though glancing at the real dispute, does not put it in a way which the plaintiff was bound to accept; and we think that the demurrer may be maintained. And then it is the same as if the defendant had demurred to the replication. There are five other pleas, varying in some measure from the fifth plea, to which there are replications, and demurrers to those replications; and upon all these the same questions arise as on the fifth plea, and the replication to that plea. And upon the pleadings it must be taken that at the time of making the act it was only such of the occupiers of messuages as were *freemen of the borough* that had a right of common.

And then the question is, upon the construction of the act of parliament and award, whether the same limitation now continues, or whether the occupiers of those messuages are, *as occupiers only*, entitled to right of common.

(*a*) Nor does it confess and avoid the matter of the replication.

The act of parliament (43 *Geo. 3*, c. 3,) itself is silent on this subject; but it states that several persons had a right of common on some parts of the land mentioned therein, and it authorizes the commissioners to make regulations for the enjoyment of the right of common on such parts of certain meadows as should be left unclosed. And then comes the clause which applies to this case. (The Lord Chief Justice then read the clause by which the commissioners are directed to set out part of West Common as common for the owners and proprietors of commonable messuages and cottages *only* (a), and then proceeded.) According to the words of this clause, without further information, it would seem that *all* the owners of commonable messuages, as such, had the right, and more particularly the word "only" being used near the end of the clause. But then, when the further information is brought to bear upon the construction of the act, (and which is admitted in the pleadings,) that at the time of passing the act, it was only such occupiers of commonable messuages as were *freemen* that had the right, it comes to be considered whether the act was meant to let in to the exercise of the common right *all* the owners of commonable messuages without any qualification, or whether it was merely an enactment as to the *place* where the commoners were to exercise their right of common, but so that no other persons should be entitled than were before.

The object of the act of parliament was, that the persons who had rights of property in the land, or rights of common on the land which was the subject of the act, should enjoy those rights more conveniently than they did before.

But there is no indication in the act of any intention to confer any rights or benefits on persons who before had no rights there, but which the defendant wishes to introduce.

There is no reason why it should have been meant that a more extensive class of persons should have a right of common than before; there is no consideration for this: and therefore we think that when the act speaks

(a) *Ante*, 714.

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of common to be enjoyed by owners of customary common-able messuages or cottages in general terms, it must mean such owners as had right of common before the act by being also burgesses, and that the object of the clause in the act was to confine their exercise of the right of common to a particular spot, seeing that other places, where before the act they used to turn on cattle, were to be inclosed.

The award could not extend the right to any further class of persons than the act mentions, unless powers had been given to the commissioners to ascertain what class of persons were entitled; but the act does not do that: it says the right of common is to be enjoyed in such way as the commissioners shall direct; which means the number and species of cattle, and the times of the year when they are to be turned on, and other things of that sort; and, indeed, looking at the award itself, it does not carry the defendant's argument, as to the extent of his right at all, farther than the act itself; for the award is, that the common shall be enjoyed by the owners, &c. of messuages, &c. having rights of common. If the words "having rights of common" are to be taken, as "having rights of common under the provisions of this act," it carries it no further than the act does; and if the words mean "persons having right of common when the act passed," then it excludes all who were not freemen. In no point of view therefore can the award carry the defendant's claim further than the act does.

And we are of opinion that neither the act nor the award gives the defendant any greater right than he had before the act, and that therefore there must be judgment for the plaintiffs.

It is to be observed that in the case of *Phillips v. Maile*(a), in which the judgment of the Court of Common Pleas was the other way, the point upon which we decide was not so distinctly brought to the notice of the Court, either on the pleadings or in the argument.

Judgment for the plaintiffs.

(a) 7 Bingham 133; 4 Moore & Payne, 770.

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## GRAVES v. WELD.

**TROVER** for clover, clover hay, and clover seed. **Plea:** Emblements not guilty. At the trial before *Taunton, J.*, at the Dorset summer assizes, 1832, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case:—

The plaintiff, in the spring of 1830, was possessed of a field called *Cleavers*, which he held, together with other closes, under a lease for ninety-nine years, determinable on three lives. In the course of that spring he sowed the close with barley, and in May of the same year he sowed broad clover seed amongst the barley. The last of the three *cetteux* *que vies* died on the 27th of July, 1830, before which time the reversionary interest in the premises became vested in the defendant. In the autumn of 1830 the plaintiff took the crop of barley, in the mowing of which a little of the clover plants which had sprung up was cut off and taken together with the barley. In January, 1831, the plaintiff gave up possession of *Cleavers* to the defendant. According to the usual course of good husbandry, broad clover is sown about April or May, and the crop is fit to be taken for hay about the beginning of June in the following year. The clover in question was cut by the defendant about the end of May, 1831, which was more than a twelvemonth after the seed had been sown. After the barley is cut, the clover is sometimes depastured by sheep in the autumn, whereby the crop is made thicker. If not so fed off, the shoots would be (liable to be) killed by the frost in the winter. In this case the clover was not depastured. Broad clover is sometimes sown by itself, but more frequently with barley, flax, oats

can only be claimed in respect of crops which grow by the industry and manurance of man, and which ordinarily repay the labour by which they are produced, within the year in which the labour is bestowed, though, in extraordinary seasons, they may be delayed beyond that period.

Tenant entitled to emblements can have only one crop of the thing sown, *i. e.* the crop growing at the time of the determination of his tenancy, although such crop may not compensate him for industry and manurance bestowed.

Tenant *pur auter vie* sows clover with barley in the spring; the

estate determines in the summer by death of *cetteux que vies*; in the autumn the barley is cut, and with it some clover, which increases the value of the straw; but the tenant is not, nor expects to be compensated for the industry and manurance bestowed on the clover, except by a crop which is not obtained until more than twelve months after the clover seed was sown: Held, that this was not an *annual* crop of which emblements could be taken; and also that the tenant must be considered as having taken *the growing crop* at the time when the barley was cut.

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or wheat. The part of the clover plants cut off with the barley at the time of mowing it makes the barley straw better as fodder, but the clover is sown for hay or seed, and not to improve the barley straw. When the clover grows up high it is injurious to the barley. It is the common course of husbandry to take for hay a second crop of the clover in the autumn of the year after it is sown, and a second crop was so taken by the defendant in the autumn of 1831; but when it is intended for seed no crop is taken for hay in the summer. Sometimes the clover is left for a third year, but it is not then a good crop. The usual course of husbandry is to plough up the land in the autumn of the second year for wheat.

There was no covenant in the lease as to the away-going crop, or binding the tenants to any particular course of husbandry. The learned judge took the opinion of the jury on these two questions:—1st. Whether the plaintiff received any benefit from taking the clover with the barley straw sufficient to compensate him for the cost of the clover seed and the extra expense of sowing and rolling. 2dly. Whether a prudent and experienced farmer, knowing that his term was to expire at Michaelmas, would sow clover with his barley in the spring, where there was no covenant that he should do so; and whether, in the long run and on the average, he would repay himself in the autumn, for the extra costs incurred in the spring. The jury answered both these questions in the negative.

The question for the opinion of the Court is, whether the plaintiff was entitled to the crop of clover in 1831, as emblements.

*Follett*, for the plaintiff. The general rule will not be disputed, that where a tenancy is liable to be determined by accident, the tenant, on account of the labour and expense which he has bestowed in cultivating and preparing the land, is entitled to the crops growing at the determination of the tenancy, as emblements; but not to any crop of a

permanent description, as fruit trees and the like. The reason for this rule is, that a man holding for a term of uncertain duration may be encouraged to cultivate his land by the certainty that the determination of his estate will not deprive him of the fruits of his labour. It is stated in the case that clover is sown in May, and is not usually mown until June in the following year, so that more than a twelve-month elapses before the crop has arrived at maturity. It may be contended therefore that as the text books merely say that the tenant is only entitled to *annual* crops, the defendant in this case is not entitled to the clover, which was cut at the end of May, 1831. The word "*annual*" is used in the text books, because crops usually ripen in the course of a year, but there are certain crops which do not come to perfection within the year, but of which there may yet be emblements. Mr. Justice *Blackstone*, in his Commentaries, certainly speaks of the doctrine of emblements as applying only to "*annual* artificial profit," and not to "fruit trees, grape, and the like, which are not planted *annually* at the expense and labour of the tenant, but are either a permanent or natural profit of the earth; but for this position, *Co. Litt.* 55, is referred to, and upon reference to that authority it will be found that my Lord *Coke* means that the tenant is entitled only to crops upon which labour and manure is expended with a view to immediate profit, and not to crops which grow of themselves." In *Latham v. Atwood* (a) it was held, that the tenant was entitled to the growing crop of *hops*; yet that is a plant which does not arrive at maturity in the course of a year. In *Kingsbury v. Collins* (b), the Court held, that teasles, which do not arrive at maturity in a year, might be the subject of emblements. [*Patteson, J.* That was an action for an assault, and this point was not much considered.] In this case, the jury have found that the tenant will not be repaid for the manure and labour he has bestowed upon the land, unless he be permitted to take the

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(a) Cro. Car. 515; S.C. Co. Litt. 55, b. note, 364, per Hale's MSS. (b) 4 Bingh. 202; 12 B. Moore, 424.

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clover in dispute. [*Parke, J.* A farmer sometimes bestows manure and labour upon his land in one year, so as to fit it for producing crops for a succession of years :—Would you in such a case give the farmer the crops until he was repaid for his labour?] The tenant here claims only one crop, and has had no benefit for his labour expended, since the clover taken with the crop of barley is no kind of compensation to him. The only reason for granting to the tenant as emblements crops which come to maturity within the year is this, that he is entitled to be compensated for his labour. *Williams on Executors* (a) quotes an opinion of *Dr. Burn's* (b), in which he says, speaking of emblements, that "for clover, sainfoin and the like, the reason of manurance, labour, and cultivation, is the same as for corn." *Co. Litt.* 55 b. There can be no difference, in principle, between this case and that of artificial grasses, which arrive at perfection within a year.

*Gambier, contra.* The doctrine of emblements is confined to those cases where cost or labour is expended in one part of a year, the recompence for which cost or labour, in the shape of a crop, is produced in the course of the same year. It is true, as appears from *Blackstone's Commentaries*, that emblements were originally given to the tenant to recompense the tenants for their good husbandry; but that is not the test by which to ascertain whether the tenant is entitled to emblements. For example, it is good husbandry to turn an unproductive grass field into a water meadow; yet the tenant by so doing would not acquire a title to emblements. So, it is good husbandry to plough and manure; yet in a note to *Co. Litt.* 55 a (c), it is said that lessee at will is not entitled to the costs of ploughing and manuring, if the lessor enter and determine the tenancy before the land is sown. Neither is it on the ground of compensation; for take the case of a tenant by statute merchant, whose debt is satisfied; he is


(a) P. 455.

(b) 4 Burn, Eccl. Law, 299.

(c) Note 362, from Hal. MSS.

"See S.C. Acc. Brooke's Abr. *Emblements*, pl. 7. *Tenant per Copie*, pl. 3." *Vide post*, 740, n.

clearly not entitled to compensation, yet if he sow the ground, he is, upon the doctrine of emblements, entitled to the crop. Compensation therefore is not the test. The rule of law as to emblements, which was originally laid down for the encouragement of good husbandry, has now become an arbitrary rule, and is wisely confined to annual crops, *i. e.* crops which take less, or not more, than a year to arrive at maturity. It is admitted that the word *annual* occurs in *Coke upon Littleton*. There is the same expression in *Rolle's Abridgement* (a). The decision in *Latham v. Atwood*, in which it was held that hops were *like* emblements, has been regarded as an innovation. *Cru. Dig.* vol. i. p. 110. [*Denman, J.* That was fully discussed in a tithe case in the Exchequer, *Knight v. Halsey* (b).] In *Kingsbury v. Collins* the question as to teazles being *emblements*, was not raised either by the pleadings or by the counsel. It was raised by the Court, towards the end of the argument, and decided by them without considering the nature of the crop. Besides, in raising teazles expense is incurred in the cultivation in each year. The opinion of *Dr. Burn*, which is referred to in *Williams on Executors*, is also referred to in *Amos and Ferrard on Fixtures*; where also is quoted a note by *Mr. Serjeant Hill*, 9 *Vin. Abridg.* 368 (c), in which he says, after referring to the passage in *Burn's Ecc. Law*, "If arable land is sown with a crop of corn, clover, &c. in March, and the estate of the tenant being uncertain, determine not by his own act, after harvest, and before the next year's crop of clover is ripe (which is usually in May or June,) it seems that this crop of clover will belong to him in remainder or reversion; for this crop was not a *present annual profit*, according to the expression in *Co. Litt.* 55 b. But if the land had been sown only with clover, &c. and the estate had determined as aforesaid, before the clover was ripe, whether the first and second crops of clover in the same year (for there are usually two crops in a year), or whether the first crop only, or neither of them, shall belong

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(a) Vol. i. p. 728, title *Emblements*, A. pl. 22.

(b) 2 Bos. & Pull. 180.

(c) Title, *Emblements* (A.) pl. 25.



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to the tenant, or his executors or administrators." The learned serjeant uses the words "present annual profit," and evidently thinks that such crops only can be the subject of emblements. According to the argument for the plaintiff he would be as much entitled to the second crop as to the first, since it is equally the produce of the seed which the lessee has sown. It is found by the case that sometimes clover is left for a *third* year; would the lessee be entitled to keep the remainder-man out of possession until this crop was taken? If the Court once extends the time beyond the year, there seems no reason for withholding the whole of the produce of the labour and expenditure of the tenant.

*Follett*, in reply. The proposition for which the plaintiff contends is not open to the argument of inconvenience. The plaintiff only claims a growing crop as a compensation for the labour and expense of preparing the land for that crop. He is not entitled to a second crop. When the tenant dies, the growing crop would go to his executors. It is, in a manner, severed from the land, and a part of the personal property. There is no ground for confining the right of the tenant to the crop grown within the year. It might as well be contended that a fixture, in order to be part of the personal property of the tenant, must have been put up within a year of his death. It is admitted that there are cases in which the tenant has been at considerable expense and receives no remuneration, but still the ground of giving emblements is, compensation. If in the case put in Mr. Serjeant *Hill's* note, the Court should think the tenant not entitled to emblements, he would be prevented from ever sowing his land with clover, however beneficial that might be to the land. The rule in the books is,—that which a man sows he shall reap. The question in *Latham v. Atwood* was different. There the party did not plant the hops, and the question was, whether the cultivation of the old roots brought the case within this principle. Supposing there is a late season, which causes the crop not to arrive at maturity within the year, would that circumstance deprive the

tenant of the crop? In *Evans v. Roberts (a)*, it is said by *Littledale, J.* a growing crop of corn or potatoes, or of any vegetable which is produced not spontaneously by the earth, but by the labour and expense of the occupier, goes to the executor, and not to the heir of the tenant in fee simple. [*Littledale, J.* That is a case upon the Statute of Frauds (*b*).] This case shows that the executors are entitled to the growing crop, and it makes no difference whether the crop is ten or thirteen months in coming to perfection. When the text writers speak of *annual* crops, they use the term in opposition to the *permanent* produce of the lands, as

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(a) 8 Dowl. & Ry. 611; 5 Barn. & Cressw. 829.

(b) It appears that at common law no gift or grant of emblements would pass the property without deed. Fitz. Abr. Feffements, pl. 69. The statute of frauds does not dispense with the necessity of a deed where that formality was previously required; yet it seems to have been assumed that where the provisions of that statute have been complied with, the property in emblements will pass to the vendee without any other formality being observed. See *Waddington v. Bristow*, 2 Bos. & Pul. 452; *Emmerson v. Heelis*, 2 Taunt. 42.

By 28 Hen. 8, cap. 11, incumbees are empowered to make and declare their testaments of all the profits of corn grown upon their glebe lands, manured and sown at their proper costs and charges with any corn or grain. At this period testaments might be declared of personal but not of *real* property, the statute of wills (32 H. 8, c. 1,) not having then passed.

By the statute of Merton, 20 H. 3, a widow may devise the emblements of her dower and of her

own lands. By a case decided in an earlier part of the same reign, it would seem that tenants in dower might devise their emblements before this statute, 4 H. 3, Fitz. Abr. tit. Devise, pl. 26. According to Bracton, however, no such right existed at common law: assignetur ei dos sua legitima — secundum quod tunc fuerit, culta vel inculta, cum fructibus et redditibus et omnibus aliis pertinentiis, et nihil refundatur executoribus vel hæredibus pro culturâ et curâ, quia antiquitus solet observari, quod sicut uxor dotem suam recipit post mortem viri sui cultam vel incultam ita post mortem uxoris solet restitui hæredi, culta vel inculta; quia de bladis et fructibus a tenemento non separatis, non habuit uxor testamenti factionem, sed novâ supervenienti gratiâ et provisione, sicut patet de provisionibus apud Merton, inter placita quæ sequuntur regem Henricum, anno regni sui decimo octavo, (quære vicesimo,) poterit uxor de fructibus et bladis, sive a solo separati fuerint, sive non, testari et pro voluntate suâ disponere. Bract. 69, a.

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grass. [*Parke, J.* Suppose the case of a nurseryman who plants trees for the purpose of making speedy profit, would he be entitled to the trees (*a*), as emblements?] It might be contended that he was, upon the authority of *Penton v. Robart* (*b*). [*Parke, J.* In that case there was either a consideration or an agreement.] With respect to *Serjeant Hill's* note, it may have been merely a casual remark made while reading the book, and not the deliberate opinion of that lawyer. [*Patteson, J.* In this case the expense so incurred was primarily for the sake of the corn.] That is undoubtedly so; but there are expenses incurred in sowing and rolling, which are done expressly for the clover crop.

DENMAN, C. J.—That is a case of so much importance, that we will take time to consider of it. We do not delay our judgment for want of information from the bar, for it is impossible it could have been better argued.

*Cur. adv. vult.*

DENMAN, C. J. in Trinity term delivered the judgment of the Court, and after briefly stating the facts of the case, proceeded as follows:—In this case the plaintiff is undoubtedly entitled to emblements. The question is, whether that which is here called the second crop of clover falls under that description. We think it does not.

In the very able argument before us, both sides agreed as to the principle upon which the law which gives emblements was originally established. That principle was, that the tenant should be encouraged to cultivate, by being sure of receiving the fruits of his labour; but both sides were also agreed that the rule did not extend to give the tenant *all* the fruits of his labour, or the right might be extended in that case to things of a more permanent nature, as trees, or to more crops than one; for the cultivator very often looks

(*a*) *Vide Empson v. Soden, ante*, (b) 2 East, 86.  
 vol. i. 720.

for a compensation for his capital and labour in the produce of successive years. It was therefore admitted by each, that the tenant could be entitled to that species of produce only which grows by the industry and manurance of them, and to one crop only of that product. But the plaintiff insisted that the tenant was entitled to the crop of any vegetable of that nature, whether produced annually or not, which was growing at the time of the cesser of the tenant's interest. The defendant contended that he was entitled to a crop of that species only which *ordinarily* repays the labour by which it is produced, within the year in which that labour is bestowed, though the crop may in extraordinary seasons be delayed beyond that period; and the latter proposition we consider to be the law. It is not, however, absolutely necessary to decide this question; for assuming that the plaintiff's rule is the correct one, the crop which is claimed is not *the crop growing at the end of the term*. The last cestui que vie died in July: the barley and the clover were then growing together on the same land, and a crop of *both* together was taken by the plaintiff in the autumn of that year, though the crop of clover of itself was of little value. Thus the plaintiff has *had one crop*; and if it were necessary, either generally or in the particular case, that the crop taken should remunerate the tenant, we must observe that though the crop of clover alone did not repay the expense of sowing and preparation, the case does not find that both crops together did not repay the expenses incurred in raising both. The decision, therefore, might proceed on this short ground; but as the more general and important question has been most fully and elaborately argued, we think it right to say that we are satisfied that the general rule laid down by the defendant's counsel is the right one.

The principal authorities upon which the law of emblements depends are *Littleton*, sect. 68, and *Coke's* commentary on that passage. The former is as follows:—"If the lessee soweth the land, and the lessor, after it is sown and before the corn is ripe, put him out, yet the lessee shall

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have the corn, and shall have free entry, egress and regress, to cut and carrie away the corn, because he knew not at what time the lessor would enter upon him." Lord Coke says—"The reason of this is, for that the estate of the lessee is uncertaine, and therefore, lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe; and so it is if he set roots, or sow hemp or flax, or any other *annual* profit, if after the same be planted the lessor ousts the lessee; or if the lessee dieth, yet he or his executors shall have *that yeare's crop*. But if he plant young fruit trees, or young oaks, ashes, elms, &c., or sow the ground with acornes, &c., there the lessor may put him out notwithstanding, because they will yeeld no *present annual profit (a)*." These

Emblements  
defined.

(a) Co. Litt. 55, b.

To this may be added the following authorities. "Nota per Kebell, on the construction of the statute of Merton, cap. ii, which begins *omnes vidue de cetero possunt legare blada, &c.* He said that *blada* are such things as are *annual*, as corn, hemp, flax, et hujusmodi, and not grass and other such things as will endure *beyond a year*." Keilw. 125, a.

Lord Coke, in commenting on this statute, says, "*Blada* signifieth corne or graine, while it groweth: It properly signifieth corne or graine while it is in herbâ, dum seges in herbâ: but it is taken for all manner of corne or graine, or *things annual* coming by the industry of man, as hemp, flax, &c." 2 Inst. 81.

Who entitled  
to emblements.

If tenant in dower sow the land, and afterwards takes husband who dies before severance, the widow shall have the emblements and not the executors of the husband; but if the husband sows the land and dies, his executors shall have the

emblements and not the widow; and the reason seems to be, that he that did the labour and costs of the emblements shall have them. Bro. Abr. tit. Emblements, pl. 26; Lib. Ass. anno 8, fol. 16, pl. 20.

Where *A.*, the party who *embles* the land, holds it by a title defeasible by the entry of *B.*, and *B.* enters before the emblements are severed, *A.* cannot take the emblements. So, if *A.* holds by demise from *C.*, whose estate is defeasible by the entry of *B.*, and *A.* dies before severance, *B.* may enter and take the emblements. Thus, "if a villein demise his land, and the lessee *embles* the land and dies, and the lord of the villein enters, the lord shall have the emblements." 30 Edw. 1, in itinere Cornubiæ, Fitz. Abr. tit. Villenage, pl. 45. To which Brooke adds, "Ratio videtur that the lord enters by *title*; for he who recovers land or enters by *title* (i. e. by title paramount that under which the possession was held at the time of the sowing or *emblement* of the

authorities are strongly in favour of the rule contended for by the defendants. They confine the right to things yielding present *annual* profit, and to that year's crop which is growing when the interest determines. The case of hops which grow from ancient roots, and which yet may be emblements, though at first sight an exception, really falls within this rule. In *Latham v. Atwood* (a), they were held to be "like emblements, because they are such things as grow by

land), shall have the emblements." Bro. Abr. *tit.* Emblements, pl. 45.

But where a man recovers land against J. S., who is condemned to the king in a fine, and the sheriff has seized the emblements growing on the land for the king, the sheriff cannot deliver seisin of the land to the recoveror until the emblements are severed, unless the recoveror will satisfy the king. T. 18 E. 3, Fitz. Abr. *tit.* Execucion, pl. 56.

By the Roman law.

The Roman law gives no emblements to those who claim under the party whose interest is determined by an uncertain event, and makes no distinction between fructus industriales and the spontaneous produce of the earth. "If the usufructuary cut the harvest and dies, the straw which lies in the harvest field belongs to his heir, but the stubble which is held in the earth belongs to the owner of the soil. Cutting corn or hay, gathering grapes, and shaking olives from the tree, is a perception of fruits by the usufructuary, but a different rule is to be observed with respect to such olives as have fallen from the trees." Dig. 7, 4, 13. *Frumenta quoque quesata sunt solo cedere intelliguntur.* Inst. 2, 1, 32.

By the Norman law the heirs of the widow were not entitled to the growing crops. Whether they had any claim upon the reversioner for

reimbursement of the expenses incurred by the widow in plowing and sowing the land, appears to have been matters of doubt. Basnage, Commentaire sur la Coutume de Normandie, vol. ii, 17, 18. However, if the widow died after Midsummer, her heirs were entitled to the growing hay and corn; if after the 1st of September, they had also the apples and grapes, whether the land was in her own hands or in those of her tenants, 2 Basn. 18.

Pothier (Traité du Douaire, Partie I, chap. v. § 1, No. 198,) recognizes the distinction between fructus naturales and fructus industriales, describing the latter as those which the land produces by cultivation, as corn and other grain, the fruits of vines, &c. He says that both are acquired to the dowress, as they are acquired to all other usufructuaries, *by perception*. Et vide Code Civil, Art. 582, 3, 5.

As to the mode of pleading a title to emblements, see H. 19 E. 3, Fitz. Abr. *tit.* Barr. pl. 249; Lib. Ass. fol. 25, anno 10, pl. 6; H. 40 E. 3, fol. 19, pl. 5; M. 46 E. 3, fol. 32, pl. 40; Sir H. Knivet's case, 5 Co. Rep. 85, a; more fully reported, Goldsb. 143, Cro. Car. 463.

See further as to Emblements, Lib. Ass. anno 7, fo. 12, pl. 18; Com. Dig. *Biens*, (G. 1.) (G. 2.)

(a) Cro. Car. 515.

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By the custom of Normandy, art. 505.

By the law of France.

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the manurance and industry of the owner, by the making of hills and the setting of poles." That labour and expense, without which they would not grow at all, seems to have been deemed equivalent to the sowing and planting of other vegetables. Mr. *Cruise*, in his Digest (*a*), says that this determination was probably on account of the great expense of cultivating the ancient roots. It may be observed, that the case decides, that hops, so far as relates to their annual product only, are emblements: it by no means proves that the person who *planted* the young hops would have been entitled to the first crop whenever produced.

On the other hand, no authority was cited to shew that things which take more than a year to arrive at maturity are capable of being emblements, except the case of *Kingsbury v. Collins* (*b*), in which teasles were held by the Court of Common Pleas to be so. But this point was not argued, and the Court does not appear to have been made acquainted with the nature of that crop, or its mode of cultivation; and it may be, that in the year when the plant is fit to gather, so much labour and expense is incurred as to put it on the same footing as hops. We do not, therefore, consider this case as an authority upon the point in question.

The note of Serjeant *Hill*, in 9 *Viner's Abridgment*, 368 (*c*), in Lincoln's Inn Library, which Mr. *Gambier* quoted, is precisely in point in the present case, and it proves that in the opinion of that eminent lawyer, the crop of clover in question does not belong to the plaintiff. It is stronger, because there the estate of the tenant is supposed to determine *after harvest*, whereas here it is determined before. The weight of authority, therefore, is in favour of the rule insisted upon by the defendant.

There are besides some inconveniences, doubts and disputes, which were pointed out in the argument, which would arise if the other rule were to prevail. Is the tenant to have the feeding in autumn, besides the crop in the fol-

(*a*) Vol. i. 710, 3d ed.

424.

(*b*) 4 Bingh. 202; 12 B. Moore,(*c*) Title, *Emblements* (A.) pl. 25.

lowing year? If so, he gets sometimes more than one crop. Is he to have the possession of the land for the purpose? or is the reversioner to have the feeding; and in that case is the reversioner to be liable to an action if he omits to feed off the clover, and thereby spoils the succeeding crop? These inconveniences do not arise if the defendant's rule is adopted. It also prevents the reversioner from being kept out of the full enjoyment of his land for a longer time than a year at the most; whereas, upon the other supposition, that period may be extended to two or more years, according to the nature of the crop.

We are therefore of opinion that the rule regulating emblements is that which the defendant has contended for, and that for this reason also he is entitled to our judgment.

Judgment for the defendant.

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GIBSON v. WINTER and another.

**COVENANT** upon a policy of insurance, by indenture between the plaintiff, as owner, agent, or otherwise, and the defendants (two directors of the Indemnity Mutual Marine Insurance Company). Plea: (inter alia,) payment.

At the trial before Lord *Tenterden*, C. J. at the sittings after Trinity term, 1832, the following facts appeared:

The policy of insurance was effected by the plaintiff, who was a partner in the house of *James Poingdestre & Co.*, insurance brokers in London, for *Le Quesne*, a merchant resident in Jersey. The policy, which was under seal, was effected in the name of the plaintiff for 4000*l.*, on goods laden on board a ship called the *Courier*, at and from Rio Janeiro to Europe. It appeared, upon the face of the policy, that the goods were the goods of *Le Quesne*; but the covenants were all with the plaintiff. A loss of the

A plea of payment to an action of covenant by *A.* upon a policy of insurance effected by *A.* as agent, is supported by an indorsement on the policy by *A.* purporting that the loss had been adjusted and the balance due from the defendant to *A.* paid; although the principal has not authorized such a settlement.

Whatever constitutes an an-

swer to the demand for which an action is brought, as against the plaintiff on the record, is a bar to the action, although brought for the benefit of others who have no mode of enforcing their claim except by suing in the name of the plaintiff.



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goods taking place, it was adjusted on the 15th July, 1829, by the plaintiff and the insurers, to the value of 3000*l*. On the back of the policy, that sum was indorsed as received, in the following manner:—

|                   |      |    |   |
|-------------------|------|----|---|
| Premiums of 1828, | £675 | 5  | 3 |
| ———— of 1829,     | 849  | 3  | 9 |
| Cash . . . .      | 1475 | 11 | 0 |

£3000 0 0 } as per receipt dated  
 { 23d July, 1827.

The two sums of 675*l*. 5*s*. 3*d*. and 849*l*. 3*s*. 9*d*. were the amount of premiums for various other insurances due from *Poingdestre & Co.* to the defendants. A final loss was settled between *Le Quesne* and the insurers on the 30th September, 1829, at 495*l*. 0*s*. 7*d*. This sum was paid into Court. On the 17th of July, the plaintiff wrote to *Le Quesne*, and informed him that he had obtained a settlement of 3000*l*. on account, which sum would be placed to his (*Le Quesne's*) credit, at two months from that date. *Le Quesne* wrote an answer to this letter, and in reference to the 3000*l*. says, “the same is placed in due conformity(a).” On the 25th of September, 1829, *Poingdestre & Co.* became bankrupts; *Gibson* neither paid the amount received by him nor that allowed in the account, and this action was brought by the plaintiff, at the instance of *Le Quesne*, to recover from the defendants the two sums of 675*l*. 5*s*. 3*d*. and 849*l*. 3*s*. 9*d*., on the ground that *Poingdestre & Co.* were authorized to receive the amount of the loss in money only. Lord *Tenterden* was of opinion that *Le Quesne* was not bound by any but a cash payment, unless he had adopted the payment made to his brokers, and said, that if this mode of payment had been made known to *Le Quesne*, and he had not objected to it within a reasonable time, he must be taken to have adopted it; and the question for the jury to determine was, whether *Le Quesne* knew of it, and did not object to it. His lordship also directed them to find for the defendants, if they thought *Le*

(a) i. e. “I have made you debtor in my books for the 3000*l*.”

*Quesne* meant to give credit for the 3000*l.* to *Gibson*, and to accept *him* as his debtor instead of the insurers. A verdict having been found for the defendants, a rule nisi to set aside the verdict, and for a new trial, was obtained, on the ground that *Le Quesne* had *not* acquiesced in the mode of payment, and that an underwriter, on settling a loss on a policy of insurance, cannot set off the balance due on an account between him and the broker as against the amount of the loss; and for this *Todd v. Reid* (a), *Russell v. Bangley* (b), and *Scott v. Irving* (c), were cited. This case was argued in Easter term last (d).

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*Campbell*, S. G., Sir *J. Scarlett*, and *Tomlinson*, now showed cause. The verdict may be supported on these two grounds—1st, that there was a payment to *Le Quesne* through his agents, or an arrangement equivalent to payment, which was acquiesced in by him; 2ndly, that the plaintiff, though suing as trustee or agent, is bound by his own admission.

I. It is the common practice with underwriters to keep an account with insurance brokers, and if a loss happens, to give him a cheque for the difference between the premiums due to the broker and the loss. The broker usually gives the assured a bill of exchange for the balance due to him, *Scott v. Irving* (e). This policy is effected by deed in the name of *Gibson*. He goes to the company, who are unacquainted with the name of the owner of the ship, and settles the loss. The firm of which the plaintiff was a partner, were the general agents of *Le Quesne*. They received bills of exchange for him, and in fact transacted business for him in various parts of the world. This action was tried on a former occasion before *Park, J.* in the Common Pleas, and he was of opinion that *Poingdestre* and Co. were the agents of *Le Quesne*, and that payment had been made to

First point:  
Payment.

(a) 4 Barn. & Ald. 210.

(b) 4 B. & Ald. 395.

(c) 1 B. & Adol. 605.

(d) Before *Denman, C. J.*, *Lit-  
tledale, J.*, and *Parke, J.*

(e) 1 B. & Adol. 605.

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*Le Quesne*, and nonsuited the plaintiff. [*Parke, J.* The verdict cannot be supported upon the ground put by that learned judge in the Common Pleas, viz. that it was a *general* agency, because the evidence shews it to have been a *particular* agency. The ground must be adoption, which would be a good ground, provided *Le Quesne* had known all the circumstances.] Admitting that there was not a general agency, the acquiescence by *Le Quesne* in the arrangement made it equally binding upon him as an actual payment. The circumstances of the case amounted to an acquiescence by *Le Quesne*.

Second point.

Payment to  
plaintiff on re-  
cord.

II. The plaintiff cannot say he has not been paid. In *Bauerman v. Radenius(a)*, it was held by Lord *Kenyon*, that the principal was concluded by the admission of the agent, who was the plaintiff on the record. This doctrine has been established by a series of cases, consequently the receipt signed by *Gibson* was evidence against him as plaintiff. [*Parke, J.* Your argument is, that *Gibson* being a necessary(b) plaintiff, cannot be heard to say for the benefit of another that which he could not say for himself.] The cases cited when this rule was moved for do not apply, since in those cases the action was brought in the name of the assured, and not of the agent. The issue on the record is, whether the *plaintiff* has been paid; it is shewn by the receipt indorsed on the policy, signed by the plaintiff, that he *has* been paid. The situation of *Le Quesne* would have been different if the contract had not been under seal(b).

*R. V. Richards*, in support of the rule. The real question before the Court is, whether any authority has been given by *Le Quesne* to *Gibson*, authorizing him to set off the amount of the premiums due from himself to the insurers against this loss; and, if there was no such authority in the first instance, whether *Le Quesne* has subse-

(a) 7 T. R. 664.

Dowl. &amp; Ryl. 102; 5 Barn. &amp;

(b) See *Berkeley v. Hardy*, 8

Cressw. 355.

quently adopted the mode of payment to *Gibson*. The issue is the same, whether or not the policy be under seal. A broker has no right to set off a debt due from himself against the money due to him as agent; *Todd v. Reid* (a), *Russell v. Bangley* (b), *Bartlett v. Pentland* (c). *Scott v. Irving* is in conformity with the preceding cases. In that case the assured had actually drawn a bill upon the broker, yet he recovered from the underwriters the sum which he had set off in his account with the broker. In *Russell v. Bangley*, the assured drew a bill upon the broker, (who had adjusted the loss with the underwriter), for the balance of the account of the loss; yet he recovered against the underwriter, no payment of *money* having been made to the broker. Unless, therefore, there has been a special adoption of the act of *Gibson* by *Le Quesne*, there has been no payment to him. On the 17th July, *Gibson* informed *Le Quesne* that he had obtained a *settlement* of the 3000*l.* on account. There is nothing in the word *settlement* from which *Le Quesne* could infer that two years premiums had been deducted. In the answer of *Le Quesne* to that letter, there is nothing from which assent can be implied to a particular mode of settlement.

Then, as to the question that this is a contract under seal, and that there is an admission by *Gibson* that payment has been made to him. This comes to the same question, whether there has or has not been a payment. [*Parke, J.* Have you found any case in which this question arose,—whether, where a man has received payment in a manner satisfactory to himself, he can, where he is a necessary plaintiff, suing for the benefit of another, recover for the same demand.] No case of that description has been found, but *Carr v. Hinchliff* (d) would seem to be the same in principle. In this case *Le Quesne* is the real

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First point:  
No payment  
to cestui que  
trust.

No adoption.

Second point.

Payment to  
plaintiff on  
record.

(a) 4 Barn. & Alders. 210.  
(b) 4 Barn. & Alders. 395.

(c) 10 Barn. & Cressw. 760.  
(d) 7 D. & R. 42; 4 B. & C. 547.

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plaintiff, and it is submitted that no admission by the plaintiff, unless authorized by *Le Quesne*, would bind him.

*Cur. adv. vult.*

First point :  
Acquiescence.

DENMAN, C. J., in the course of Trinity term, delivered the judgment of the Court. After stating the facts of the case, his lordship proceeded as follows:—On the trial before the late Lord *Tenterden*, at the sittings after Trinity term, the defendants had a verdict, on the ground that *Le Quesne* had acquiesced in and adopted the mode of payment to the plaintiff, and was bound by it. Mr. *Pollock* moved for a new trial in the following term. The case was afterwards fully argued before us, and if it had depended upon the propriety of the verdict we should have thought it right to submit the case to the consideration of another jury, for we are by no means satisfied that there was sufficient evidence of adoption by *Le Quesne*, as he was never correctly informed of the real state of facts. It was insisted by the counsel for the defendants, that the evidence proved a general agency in *Poingdestre* and *Gibson*, and therefore that their acts bound *Le Quesne*. But we are of opinion that the verdict cannot be supported on this ground, as their general agency was not proved; indeed it was negatived on the trial.

Second point:  
Payment to  
plaintiff on re-  
cord.

It was also objected, that as the covenant was with *Gibson*, and he only could sue upon it, payment to him, in any mode by which *he* was bound, would be a good payment as against *Le Quesne*; and that as the settlement with the plaintiff bound him, it equally bound *Le Quesne*, suing in his name. And upon full consideration we are of opinion that this objection is valid. The plaintiff, though he sues as a trustee of another, must in a court of law be treated in all respects as the party in the cause; if there be a defence against him, there is a defence against the cestui que trust, who uses his name; and the plaintiff cannot be permitted to say, for the benefit of another, that his own act is void, which he cannot

say for the benefit of himself. The following are the authorities which appear to us fully to warrant this position. In *Bauerman v. Radenius* (a), (where the question was, whether the admission by the plaintiff, who was clearly a trustee for another, could be received in evidence), Lord *Kenyon* says, "If the question that has been made in this case had arisen before Sir *Matthew Hale*, or Lords *Holt* or *Hardwicke*, I believe it never would have occurred to them, sitting in a Court of Law, that they could have gone out of the record, and considered third persons as parties in the cause." If the plaintiffs "may be taken to be off the record, then they may be witnesses; and yet it is not pretended that they could have been examined. The argument therefore, that asserts that they may be taken from off the record, not holding good to all purposes, fails entirely. I cannot conceive on what ground it can be said that they may be considered not as parties to the cause for the purpose of rejecting their admissions, and yet as parties to the cause for the purpose of preventing their being examined as witnesses. I take it to be an incontrovertible rule, that the admission made by the plaintiff on the record, is admissible evidence." So a release by the plaintiff on the record, suing for the benefit of another, was decided in a case before Lord *Mansfield* (cited in *Bauerman v. Radenius*), to be a good answer at law; and *Lawrence*, J. expressed the same opinion in the case last mentioned. Courts of Law have been in the habit of exercising an equitable jurisdiction on motion, and setting such releases aside, or preventing defendants from pleading them, as in *Legh v. Legh* (b), *Payne v. Rogers* (c), *Jones v. Herbert* (d), *Skaipe v. Jackson* (e), and in many other cases; which practice shews very clearly the opinion of the Courts, that, but for their equitable interference, the real plaintiff would be barred. In *Crabb v.*

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(a) 7 T. R. 668; S. C. per nomen *Bouerman v. Radenius*, 2 Esp. N. P. C. 653. And see *Lane v. Chandler*, 2 Smith, 77, 81.

(b) 1 Bos. & Pull. 447.

(c) Douglas, 407.

(d) 7 Taunt., 421.

(e) 3 B. & C. 421; 5 D. & R. 290.

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*D'Aeth*(a), the circumstances of fraud upon the real plaintiff were replied, but no objection appears to have been taken on this ground, and the general practice is undoubtedly to apply specially to the Court. Again, in *Alner v. George*(b), where trustees for the benefit of creditors sued in the name of the insolvent, Lord *Ellenborough* held, that a receipt in full for the amount by the plaintiff, was an answer to the action; and his lordship said, "If a motion had been made in term time, to prevent the defendant from availing himself of this defence, perhaps we might have interfered: sitting here I can only look to the strict legal rights of the parties upon the record; and there can be no doubt that a receipt in full, where the person who gave it was under no misapprehension, and can complain of no fraud or imposition, is binding upon him. The plaintiff might have released the action, and it is impossible to admit evidence of his attempting to defraud others." In *Jones v. Yates*(c), Lord *Tenterden* says: "We are not aware of any instance in which a person has been allowed, as plaintiff in a Court of Law, to rescind his own act, on the ground that such act was a fraud on some other person, whether the party seeking to do this has sued in his own name only, or jointly with such other person (d)." And therefore it was held, that where one of two partners dispose of some of their effects in fraud of the other, both could not sue in a Court of Law, to recover for them in an action of trover. Upon principle and upon these authorities we are of opinion that if there be a good defence against the plaintiff, there is a good defence against *Le Queune* suing in his name.

The only remaining question is, whether there is a good defence against the plaintiff. Now if the plaintiff was suing for himself, it is clear that the plea of payment would have been proved; for when credit was given to the plaintiff by mutual agreement for the amount of the pre-

(a) 7 T. R. 670, n.

(b) 1 Campb. 392.

(c) 9 B. &amp; C. 532; 4 M. &amp; R. 613.

(d) 9 Barn. &amp; Cressw. 538.

miums, it was equivalent to payment by the plaintiff to the defendants of that amount on account of the premiums, and a payment by the defendants to the plaintiff of the same sum on account of the loss. We therefore think that the defendants were no longer liable.

As the point upon which we decide this case was intended to be reserved, if necessary, by Lord *Tenterden*, in which case a nonsuit would have been directed to be entered, we think that a similar rule should be now pronounced.

Rule absolute, to enter a nonsuit.

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NOWELL v. DAVIS and another, Executors, &c.

**ASSUMPSIT** against the defendants, as executors of one *Hearne*. Upon a second trial of this cause, before Lord *Tenterden*, C. J., at the Middlesex sittings after Trinity term, 1832, *Elizabeth Hall* was called as a witness by the defendants. Upon being examined upon the *voir dire*, the witness stated that her husband was entitled to an annuity of 26*l.* a year under the will of the defendants' testator; and that by the will, 5*l.* was bequeathed to her, which was unpaid. It was then objected that the witness was incompetent, as it was her interest to prevent a diminution of the effects of the testator. The Lord Chief Justice for this reason rejected the witness, and the plaintiff obtained a verdict. A rule nisi for a new trial was subsequently obtained, on the ground that this witness had been improperly rejected.

In an action against executors, an unpaid legatee is a competent witness for the defendants.

Sir *James Scarlett* and *R. V. Richards*, in Trinity term, shewed cause. The witness was *prima facie* incompetent. As soon as it appeared that there was a debt of the testator's to the witness unpaid, the plaintiff was entitled to call for evidence of the sufficiency of the funds of the testator. The



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onus probandi ought to lie upon the party who is legally in the possession of the means of proving or disproving the fact. But assuming that it was for the plaintiff to prove the insufficiency of the assets, the circumstance itself of the *5l.* continuing unpaid, might be relied on. A creditor cannot give evidence for the assignees of a bankrupt, to increase the funds out of which he is to be paid, unless some evidence is previously given of the sufficiency of assets. Upon the same principle this witness is not admissible. In *Craig v. Cundell(a)*, which is the leading case upon this subject, it was held, that in an action by an executor, if the estate of the testator is insolvent, a person who has an unsatisfied demand upon it is not a competent witness for the plaintiff. *Allington v. Bearcroft(b)* is similar in principle. In *Clarke v. Gannon(c)*, the legatee, who was admitted as a competent witness, had been paid.

*Campbell, S. G. contra.* The general question arises, whether a legatee is a competent witness in an action against the executors, to increase the funds. [*Parke, J.* It is difficult to see how the state of the funds can alter the competency of the witness.] With regard to the fact of the *5l.* remaining unpaid, that is consistent with an abundant sufficiency of funds. There is a clear distinction between this case and that of an action by the assignees of a bankrupt; for there, the action, though brought nominally by the assignees, is instituted for the benefit of the creditors. This is the reason why the creditors of a bankrupt are incompetent as witnesses for his assignees. If the testator were alive, and an action were brought against him, a creditor would be a competent witness for him, without proof of solvency. What reason can there be for a different rule in this case? In *Paul v. Brown(d)* it was held, in an action by an administrator for a debt due to the intestate, that a creditor of the intestate's was competent to prove the

(a) 1 Campb. 381.

(b) 2 Peake, N. P. C. 212.

(c) Ry. &amp; Mood. N. P. C. 31.

(d) 6 Esp. 34.

existence of the debt. If a creditor is competent, *à fortiori* a legatee is so; and the case must be the same, whether the evidence of the witness has a tendency to increase the funds in an action *by* an executor, or to prevent a decrease in a suit *against* an executor.

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DENMAN, C. J., in Trinity term, delivered the judgment of the Court, and after stating shortly the circumstances of the case, said—We think the witness should have been admitted. We can see no difference in principle between the case of a creditor and of a legatee.

Rule absolute.



MASON v. HILL and others.

CASE, for diverting a watercourse. Plea, the general issue. At the trial at the last Staffordshire spring assizes, a special verdict was found to the following effect:

A stream of water called the Stubbs Brook, from time whereof &c., until &c., had been accustomed to flow from the northern end of the town of Newcastle-under-Lyne, in a southerly direction, by the corner of a garden called Kinnersley Garden, and into and through a croft called Hatrell's Croft, by a tree there called the Sitchwell Tree, and from thence into a piece of land called the Parson's Flat, by a spring there called the Sitchwell Spring, and thence through other closes into a croft called Ashley's Croft, part of which, at the times when &c., belonged to the defendants; and other part, at the time when &c., belonged to the plaintiff, and at which part last aforesaid the mill &c. of the plaintiff in the declara-

The right to appropriate a stream of water in exclusion of any of the owners of the banks of the stream, cannot be acquired within a less period than 20 years.

No proprietor of the banks of a stream has a right to diminish the quantity, or injure the quality, of the water, to the detriment of others similar possessors of the other parts of the banks.

A licence to take a quantity of water at a particular place, will not authorize the taking away the same quantity of water at another place.

A general licence to take water at any place is revocable, except as to such places where it has been acted upon, and expense incurred.

The owner of the banks of a stream has a right to the advantages of that stream, flowing in its natural course, and is entitled to use it for any purpose not inconsistent with a similar enjoyment in the owners above and below.

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tion and hereinafter mentioned, then were and are now situate. But the stream ran and flowed only through that part of the said croft which now belongs to the plaintiff, and thence through another close unto the Newcastle Lower Canal. During all this time a considerable quantity of pure water at all times flowed from the Sitchwell Spring, and also from other springs called the Over Canal Springs, into the said stream, which last-mentioned springs flowed into the stream below the Sitchwell Spring, and the said stream, before the diversions thereof, as hereafter mentioned, flowed down and along its natural and ancient course, to, through, and along Ashley Croft.

Upwards of twenty years before the year 1818, *Thomas Ashley*, the father, who was then the occupier and owner of Ashley's Croft, had appropriated and used the water of the said stream and springs for watering his cattle, and also for irrigating that part of the said croft which now belongs to the plaintiff.

In the year 1818 the defendant erected a mill and manufactory in a close adjoining Ashley's Croft, near but not contiguous to the said stream, and at that time *Thomas Ashley*, the son, who was then the occupier and owner of the whole of Ashley's Croft, gave to the defendants a parol licence to make a dam at the Sitchwell Tree, higher up the stream than the Sitchwell Spring and the Over Canal Springs, and to take what water of the stream they pleased from that point to the defendant's mill &c., which water, after being used at the said mill, was to be returned by pipes into the bed or channel of the said stream higher up than that part of Ashley's Croft which now belongs to the plaintiff. In consequence of such parol licence, the defendants did, in the year 1818, erect such dam, and thereby take part of the water of the stream above the Sitchwell Spring and the Over Canal Springs for the use of their mill &c., by the means of pipes laid down at their own expense to a large amount, and for a considerable time returned part of such water back again by means of other

pipes into the stream between the Sitchwell Spring and the plaintiff's part of Ashley's Croft.

Also, in 1818, the defendants collected into a tank part of the water of the Over Canal Springs, and by means of pipes carried the same over the brook into a reservoir which received the water, taken under the licence from the Sitchwell Tree; but such licence did not extend to take such water from the Over Canal Springs. After the dam was made, part of the water of the stream which flowed over and through the dam, and also all the water from the Sitchwell Spring, and after the making of the tank part of the water from the Over Canal Springs, not collected in the tank, flowed at times in its ancient and natural course towards, into, through, and along Ashley's Croft, and until the diversion thereof by the defendants, as hereinafter next mentioned. The parol licence so given by *T. A.*, the son, to the defendants, to make the dam at the Sitchwell Tree, did not empower them to take the water from the Sitchwell Spring, nor from the Over Canal Springs. In 1823 the plaintiff erected and made the manufactory and premises in the declaration mentioned, upon his part of Ashley's Croft, by the side of the stream; and the plaintiff, by the leave and licence of the defendants, laid down pipes between his mill and that of the defendants, and took the hot water which came from the engine and mill of the defendants unto and into his, the said plaintiff's, manufactory, for the purposes thereof, until the month of February, 1829, when the communication by means of the said pipes was cut off by the plaintiff; and at that time, and until the diversion thereof by the defendants, as hereinafter next mentioned, the plaintiff appropriated and used part of the water of the stream which flowed over and through the dam so made at the Sitchwell Tree aforesaid; and also the whole of the water which flowed from the Sitchwell Spring, and also from such part of the Over Canal Springs as was not taken into the tank, and also all the water which was returned by the pipes of the defendants into the stream, for the purposes of his mill and manufactory.

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In October, 1828, the plaintiff erected a steam engine and mill for the purposes of his manufactory, and at that time and until the diversion thereof by the defendants, as hereinafter next mentioned, appropriated and used part of the water of the stream which flowed over and through the dam so made at the Sitchwell Tree as aforesaid, and also the whole of the water which flowed from the Sitchwell Spring, and from such part of the Over Canal Springs as was not taken into the tank, and also the water which was returned by the pipes of the defendants into the said stream for the purposes of his mill.

There is a ridge of land between the stream and the defendants' mill, which, in the highest part, is thirteen feet, and in the lowest part nine feet, above the level of the defendants' mill, and which would prevent the water of the stream from flowing in its natural course to the defendants' mill, &c. The plaintiff's mill is eleven feet below the level of the defendants' mill.

In January, 1829, the plaintiff destroyed the dam at the Sitchwell Tree, which the defendants re-erected, and which the plaintiff again destroyed, in order that the water might run along in its ancient and natural course; and on the 18th of February then next the plaintiff gave notice to the defendants not to divert or turn the water of the stream from its ancient and natural channel.

In June, 1829, the defendants erected another dam in and across the stream, lower down than the place where the Sitchwell Spring and such part of the Over Canal Springs as were not taken into the tank flowed into the stream; by means of which last-mentioned dam all the water of the stream, and also all the water of the Sitchwell Spring and such part of the Over Canal Springs as aforesaid was diverted from its ancient and natural course, and was prevented from flowing along the same to the plaintiff's mill &c. On certain days, to wit, twenty days between the making the last-mentioned dam and the commencement of this suit, all the water was taken by the defendants, by

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means of the last-mentioned dam, from the stream and the Sitchwell Spring, and such part of the Over Canal Springs as aforesaid, and no water was, on these days, returned by the defendants into the bed or channel of the stream, but the water from the stream of the Sitchwell Spring and such part of the Over Canal Springs as aforesaid was on those days diverted by the defendants in a totally different direction. Although on other days since the last-mentioned dam was made some water was returned by the defendants into the stream between such dam and the plaintiff's mill &c., yet from day to day as much water was not returned by the defendants into the stream as was taken from it by them; and the water which was returned by the defendants on such days came back in a heated state. The dam so erected by the defendants in June, 1829, stopped, diverted, and turned more water than the dam so made at the Sitchwell Tree, in 1818, by the licence of the said T. A.

After the dam at Sitchwell Tree had been knocked down by the plaintiff, the defendants might have put it up again in the same place. They were not prevented from so doing by the plaintiff. Upon some occasion before the erection of the plaintiff's engine, the plaintiff *misconducted himself* by throwing or pounding back the hot water upon the defendants' mill by the pipes, by which the hot water was carried from the defendants' mill to the plaintiff's mill. By means of the premises the plaintiff was hindered and prevented from enjoying the said mill &c. in the declaration mentioned, and from carrying on his business therein in so beneficial a manner as he otherwise would have done; and was deprived of certain profits &c.

Contingent damages were assessed according to the right of the plaintiff to recover for the diversion of the whole water of the stream, or of any and what part of it, or for the heating of the part returned. This case was argued in Easter term, 1833, before *Denman, C. J., Littledale, J. and Parke, J.*

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*Campbell*, S. G., for the plaintiff. The plaintiff will be entitled to the judgment of the Court in his favour, if any part of the water has been unlawfully diverted. This question may be rested upon the former decision in this very case, upon a motion for a new trial, which was granted (a). The Court on that occasion held, "that the proprietor of lands contiguous to a stream, may, as soon as he is injured by the diversion of the water from its natural course, maintain an action against the party so diverting it; and it is no answer to the action that the defendant first appropriated the water to his own use, unless he has had twenty years enjoyment of it in the altered course." [*Parke*, J. This is exactly similar to the case of *Bealey v. Shaw* (b), since there has been an appropriation by the plaintiff of the remainder of the water which flowed over the dam, and also that water which went through the pipes.] Even if the decision of the Court in the former case of *Mason v. Hill* cannot be supported, the plaintiff in this case is entitled to recover, because it is found that the stream had been appropriated by the plaintiff for the purpose of watering his cattle, previously to the appropriation by the defendants; and it is now well settled, although it was once held otherwise, that water appropriated originally for one purpose may be used for another. A question will of course be raised respecting the effect of the licence given by *Thomas Ashley* to the defendants. It is submitted, first, that the licence was revocable and was revoked; and secondly, that it should be granted by deed. There may be an irrevocable licence, but then a licence of that description must be exercised upon the land of the licensee; *Webb v. Paternoster* (c). This was the grant of an easement, and should have been by deed. In *Hawkins v. Shippam* (d), it was clear that a licence of this sort was to be considered as an easement in the land of another, and could be granted only by deed,

(a) 3 Barn. &amp; Adol. 304.

(b) 6 East, 208; 2 Smith, 321.

(c) Palm. 71. See 7 Bingh. 688.

(d) 7 D. &amp; R. 763; 5 B. &amp; C. 22.

*Bryan v. Whistles* (a). This is not an action for continuing a dam erected in pursuance of the licence, but for erecting a new one lower down."

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*Peake*, Serjt. for the defendant. As to the first question, whether any right can be acquired to the use of a water-course, unless that right has been enjoyed for a period of twenty years, there is no case from the time of Lord Hale, down to the present period, which has decided that this right cannot be obtained within twenty years, except *Wright v. Howard* (b). There the cases on this subject were not cited, nor did the subject undergo much discussion. It is unreasonable that a man who suffers another to appropriate water to his own use, and who, by his acquiescence, induces him to incur great expenses in erecting mills, should be permitted at a subsequent period to deprive him of the use of the water. It is unjust to the party who appropriates the water, and it would be extremely injurious to the public, if by such appropriation the individual did not gain a right to the exclusive use of the water for the purposes for which he had appropriated it. *Cox v. Matthews* (c), and *Bealey v. Shaw* (d), establish the same principle, although the situation of the parties was different. It is evident from the judgment of Mr. Justice *Le Blanc*, in the latter case, that he considered the title to water arose immediately upon appropriation, and was not deferred until twenty years after the appropriation had taken place. *Williams v. Morland* (e), *Canham v. Fisk* (f), and *Saunders v. Newman* (g), all establish the principle, that the title to water is acquired by, and at the time of, appropriation. Flowing water, like light and air, is said to be publici juris. It cannot therefore be the property of the owners of the adjoining land. The expression, that water is publici juris,

(a) 2 M. & R. 318; 8 B. & C. 288.

(b) 1 Sim. & Stu. 190.

(c) 1 Vent. 237.

(d) 6 East, 208; 2 Smith, 321.

(e) 4 D. & R. 583; 2 B. & C. 910.

(f) 2 Crompt. & Jerv. 126.

(g) 1 B. & Ald. 258.



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affords the inference that the person who first appropriates it shall be entitled to the enjoyment of it. In *Blackstone's Commentaries* (a), one of the first titles which is mentioned is that of a right to water *by appropriation*. Running water is not in itself the subject of *property*. A person can only claim the right of *using* the water.

Then as to the licence. By the licence the plaintiff is entitled to the use of the water, and the plaintiff cannot now object to the mode in which the licence is used. It may be admitted that the licence to lay down pipes on the land of another cannot be granted, except by deed. The right claimed in this case is to take water which is flowing through the land of the party to whom the licence is granted. In *Hawkins v. Shippam* the licence was to make a drain on the land of the grantor. In *Liggins v. Inge* (b), a *parol* licence to lower the bank of a river, which was the soil of the licensee, and to make a weir above the mill of the party licensing, was held sufficient. *Winter v. Brockwell* (c), is the same in principle. The licence is irrevocable, *Taylor v. Waters* (d). The plaintiff cannot recover by reason of the present dam being erected lower down the stream than the spot mentioned in the licence, for the plaintiff has been himself a wrong-doer. But for the plaintiff's misconduct the new dam would not have been erected. The first wrong-doer cannot recover in an action on the case. *Bird v. Randal* (e); Com. Dig. title Action on the case, (B. 4). As to the original appropriation by *Ashley*, that was merely in respect of the right of irrigating his meadows and watering his cattle.

*Campbell*, S. G. in reply. The only two cases which have been cited on this occasion, and which were not quoted when the former case of *Mason v. Hill* was discussed, are *Canham v. Fisk*, and *Saunders v. Newman*; and

(a) Vol. ii. p. 14.

(b) 7 Bingh. 682; 5 M. &amp; P. 712.

(c) 8 East, 308.

(d) 2 Marsh. 551; 7 Taunt. 374.

(e) 3 Burr. 1345.

neither of them establish the proposition, that the title to water can be acquired within twenty years. All that is meant, when it is said that the water is *publici juris*, is, that no person can acquire *property* in it; but the right to apply it to some useful purpose may be acquired after an user of twenty years. No intermediate period of time has been attempted to be fixed.

Then, as to the licence. Nothing has been urged to shew that the licence in this case need not be by deed, and the case in this respect is not distinguishable from *Hawkins v. Shippam*. The case therefore comes to this question, whether a grant to use a water-course can be preserved within a less period than twenty years.

*Cur. adv. vult.*

DENMAN, C. J., in Trinity term delivered the judgment of the Court.—This was an action for the obstruction of a water-course. The substance of this special verdict is this. The defendants' mill was erected in 1818, the plaintiff's in 1823, on a piece of land, the former owner and occupier of which had, for twenty years prior to 1818, appropriated the water of the stream and springs for watering his cattle and irrigating that land. At the time when the defendants' mill was erected, the then owner and occupier of the plaintiff's land gave a parol licence to the defendants to make a dam at a particular place above where the Sitchwell Tree stood, and to take what water they pleased from that point to their mill; which water was so taken and returned by pipes into the stream above the spot where the plaintiff's mill was afterwards erected. In 1818, the defendants conducted part of the water of the Over Canal Springs, which had before flowed into the stream, into a reservoir, for the use of their mill. After the *plaintiff* erected his mill in 1828, he appropriated to its use all the surplus water; viz. that which flowed over and through the dam, that from the Over Canal Springs which was not conducted into the reservoir,

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guides from the Sitchwell Springs (which was a portion of the land) and that which was owned by the defendant into the reservoir. On January 29, 1888, the plaintiff erected a dam across the stream, and by the dam he diverted from the plaintiff's land, as a dam, the stream, including all the water so appropriated, to the main part of it, and returned the remainder in heated water to the stream. And the questions upon this special verdict are: Whether the plaintiff is entitled to recover for the diversion of the whole water of the stream, or of any and what part of it, or for the heating of the part returned. That the plaintiff has a right to a verdict for the injury sustained by the abstraction of the whole of the surplus water, and by the abstraction of part, and the heating of the remainder of that surplus water, does not admit of the least doubt. In any view of the law on this subject, whether the right to the use of flowing water be in the first occupant, as the defendants allege, or in the possessor of the land through which it flows in its natural course, as is contended on the other side, the plaintiff was entitled to this surplus, for he filled both characters. He was the first occupant of it, and he was the owner and occupier of the land through which it flowed. In this respect, the case is exactly like that of *Bentley v. Shaw* (a). The learned counsel for the defendant argued, that inasmuch as the plaintiff pulled down the dam at the Sitchwell Tree, in consequence of which the dam was erected, he must be considered as the author of the mischief, and has no right to complain of the loss; however, quite impossible to sustain such a position. If the plaintiff committed a wrongful act in demolishing the dam, the defendants might have restored it, or brought questions they had no right to construe another at a different place, and by means of it abstract more water than the other had done. The remaining questions are, whether the plaintiff can re-

Defendants' remedy for demolition of dam.

1. The plaintiff is entitled to a verdict for the demolition of the dam.

cover in respect of the abstracting, or the injury by heating of that portion of water which was before diverted by the licence of the then owner and occupier of the plaintiff's field; and secondly, in respect of that portion of the Over Canal Springs which was conveyed, in 1818, to the defendant's reservoir; both of which portions have been at one time entirely, and at another partially abstracted, and in the latter case returned in a heated state into the brook. And we are of opinion that the plaintiff is entitled to recover in respect of both.

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As to the former of these portions, the defendants contend that the plaintiff has no right of action, because the former owner and occupier of the plaintiff's land gave an irrevocable licence by parol to the defendants to divert so much water by the Sitchwell Tree dam. And to prove that a parol licence to divert water which has been acted upon by the person to whom it is given, and expense incurred in consequence, is irrevocable, the case of *Liggins v. Inge* (a) was cited. But admitting that the licence to abstract the water at that particular point, and by means of that dam, was irrevocable, and that the plaintiff was therefore a wrong-doer in pulling the dam down, it by no means follows that he is not to recover for an equal portion of water abstracted at a different place. In the first place, the licence is not *general*, to take away at *any* point, but at this only; and in the second place, if the licence had been general to take away *at any place*, it would have been clearly revocable, except as to those places where it had been acted upon and expense incurred (for it is on that ground only that such a licence can be irrevocable); and as it was revoked before the last dam was erected, the defendants could not justify the abstraction of any portion of the water, by virtue of the licence, at such dam.

Irrevocable  
licence.

The last question is, whether the plaintiff ought to recover in respect of that portion of the water which


Appropriation  
of use of wa-  
ter.

(a) 7 Bingham 682; 5 Moore & Payne, 712, S.C.

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was diverted from the Over Canal Springs and collected in a tank in 1819. This was taken without licence, and appropriated by the defendants to the use of their mills before any other appropriation, but has not been so appropriated for twenty years; and the point to be decided is, whether the defendants, by so doing, acquired any right to this against the plaintiff, through whose field it would otherwise have flowed in its natural course; and we are of opinion that they did not. This point might perhaps be disposed of in favour of the plaintiff, even admitting the law to be as contended for by the defendants; that the first occupant acquires a right to flowing water; for by this special verdict, all the water of the brook is found to have been appropriated by *Ashley*, the father, and used for twenty years, up to the year 1818, for watering his cattle and irrigating the field, now the plaintiff's. A right to use the water thus acquired by occupancy in right of the field, must have passed to the plaintiff, and could not be lost by mere non user from 1819 to 1829; and the total or partial abstraction of the water may be an injury to such right in point of law, though no actual damage is found by the jury to have been sustained in that respect. But we do not wish to rest a judgment for the plaintiff on this narrow ground. We think it much better to discuss, and, as far as we are able, to settle, the *principle* upon which rights of this nature depend. The proposition for which the plaintiff contends is, that the possessor of land, through which a natural stream runs, has a right to the advantage of that stream flowing in its natural course, and to use it when he pleases for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above and below; that no proprietor above can diminish the quantity or injure the quality of water which would otherwise descend; that no proprietor below can throw back the water without his licence or grant; and that whether the loss, by diversion, of the general benefit of such a stream be or be not such an injury, in point of law, as to sustain an

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action without some special damage, yet as soon as the proprietor of the land has applied it to some purpose of utility, or is prevented from so doing by the diversion, he has a right of action against the person diverting. The proposition of the defendants is, that the right to flowing water is, *publici juris*, and that the first person who can get possession of the stream, and apply it to a useful purpose, has a good title to it against all the world, including the proprietors of the land below, who has no right of action against him, unless such proprietor has already applied the stream to some useful purpose also, with which the diversion interferes; and in default of his having done so, may altogether deprive him of the benefit of the water. In deciding this question, we might content ourselves by referring to and relying on the judgment of this Court in this case, on the motion for a new trial in Hilary term, 1832 (a); but as the point is of importance, and the form in which it is now again presented to us leads to a belief that it will be carried to a Court of Error, we think it right to give the reasons for our judgment more at large. The position that the first occupant of running water for a beneficial purpose has a good title to it, is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as in other cases of injuries to real property, possession is a good title against a wrong-doer. If the owner of the land applies the stream that runs through it, to the use of a mill newly erected, or other purposes, and the stream is diverted or obstructed, such owner may recover for the consequential injury to the mill; *Earl of Rutland v. Beider* (b): but it is a very different question whether he can take away from the owner of the land below, one of its natural advantages, which is capable of being applied to profitable purposes, and which generally increases the fertility of the soil even when unapplied, and deprive him of it alto-

(a) 3 Barn. & Adol. 304.

(b) Palmer, 290.

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gether by anticipating him in its application to a useful purpose. If this be so, a considerable part of the value of an estate which, in manufacturing districts particularly, is much enhanced, by the existence of an unappropriated stream of water, with a fall within its limits, might at any time be taken away; and, by parity of reasoning, a valuable mineral or brine spring might be abstracted from the proprietor, in whose land it arises, and converted to the profit of another. We think that this proposition has originated in a mistaken view of the principles laid down in the decided cases of *Bealey v. Shaw* (a), *Saunders v. Newman* (b), and *Williams v. Moreland* (c). It appears to us also, that the doctrine of *Blackstone*, and the dicta of learned judges, as well in some of those cases, as also in that of *Cor v. Matthews* (d), have been misconceived.

In the case of *Bealey v. Shaw*, the point decided was, that the owner of land through which a natural stream runs (which is diminished in quantity, by having been in part appropriated to the use of works above, for twenty years and more without objection), may, after erecting a mill on his own lands, maintain an action against the proprietor of those works for an injury to that mill, by a further subsequent diversion of the water. This decision is in exact accordance with the proposition contended for by the plaintiff, that the owner of the land, through which the stream flows, may, as soon as he has converted it to a purpose producing benefit to himself, maintain an action against the owner of the land above, for a subsequent act by which that benefit is diminished; and it does not in any degree support the position that the first occupant of a stream of water has a right to it against the proprietors of land below. Lord *Ellenborough* distinctly lays down the rule of law to be, "that, independently of any particular enjoyment, used to be had by another, every man has a right to have the advantage of a flow of water, in his own land, without diminution or alter-

(a) 6 East, 208; 2 Smith, 321. (c) 2 Barn. & Cress. 914.  
(b) 1 Barn. & Alders. 258. (d) 1 Ventris, 237. 1 B. & P. 1 (e)

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ation. But, he adds, "an adverse right may exist, founded on the occupation of another; and though the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades; yet if the occupation of the party so taking or using it have existed for so long a time as may raise the presumption of a grant, the other party whose land is below, must take the stream subject to such adverse right." *Lawrence, J.* confirms the opinion of *Graham, B.* on the trial, "that persons possessing lands on the banks of rivers had a right to the flow of the water in its natural stream, unless there existed before a right in others to enjoy or divert any part of it to their own use." *Le Blanc, J.* in his judgment, says as follows:—"The true rule is, that after the erection of works, and the appropriation, by the owner of land, of a certain quantity of the water flowing over it, if a proprietor of other land afterwards takes what remains of the water before unappropriated, the first-mentioned owner, however he might before such second appropriation have taken to himself so much more, cannot do so afterwards." And this expression, in which, in truth, that learned judge cannot be considered as giving any opinion upon the effect of a prior appropriation, is the only part of the case which has any tendency to support the doctrine contended for by the defendants.

The case of *Saunders v. Newman* (a) is no authority upon this question, and is cited only to shew that *Holroyd, J.* quotes the opinion of *Le Blanc, J.* above mentioned, and he confirms it so far as this, that the plaintiff, by erecting his new mill, appropriated to himself the water in its then state, and had a right of action for any subsequent alteration to the prejudice of his mill; about which there is no question. The last and principal authority cited is that of *Williams v. Moreland* (b). The case itself decides no more than this—that the plaintiff having in his declaration complained that the defendants had, by a flood-gate across the stream above, prevented the water

(a) 1 B. & Ad. 458. (b) 4 Dowl. & Ry. 586; 2 Barn. & Cresh. 910.



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from running in its regular course through the plaintiff's land, and caused it to flow with increased force and impetuosity, and thereby undermined and damaged the plaintiff's banks, could not recover, the jury having found that no such damage was sustained. The judgments of all the judges proceed upon this ground, though there are some observations made by my brother *Bayley*, which would seem at first sight to favour the proposition contended for by the defendants. These observations are, "Flowing water is originally publici juris. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it. Subject to that right, all the rest of the water remains publici juris. The party who obtains a right to the exclusive enjoyment of the water, does so in derogation of the primitive rights of the public. Now if this be the true character of the right to water, a party complaining of the breach of such a right ought to shew that he is prevented from having water which he has acquired a right to use for some beneficial purpose" (a). The dictum of *Tindal*, C. J. in *Liggins v. Inge* (b), is to this effect:—"Water flowing in a stream, it is well settled by the law of England, is publici juris; by the Roman law, running water, light, and air, were considered as some of those things which were *res communes*, and which were defined—things, the property of which belongs to no person, but the use to all (c). And by the law of England, the person who first appropriates any part of this water *flowing through his land* to his own use, has the right to the use of so much as he then appropriates *against any other*;" and for that he cites *Bealey v. Shaw*; which case, however, is no authority for this position, as far as it relates to the owner of the land below. Probably therefore the expression "any other," was intended to apply only to those who *diverted or obstructed* the stream. To these dicta may be added the passage from *Blackstone's Commentaries* (d),

(a) 2 Barn. &amp; Cress. 913.

(c) 7 Bingh. 692.

(b) 7 Bingh. 682; 1 Moore &amp;

(d) Vol. 2, p. 14.

Payne, 712.

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"There are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (amongst others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mill, and other conveniences; such also are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untamable disposition, which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards."

In the same volume it is also said, "Water is a movable wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary, transient, usufructuary property therein; wherefore if a body of water runs out of my pond into another man's, I have no right to reclaim it." (a) None of these dicta, when properly understood with reference to the cases in which they were cited, and the original authorities in the Roman law from which the position that water is *publici juris* is deduced, ought to be considered as authorities that the first occupier or first person who chooses to appropriate a natural stream to a useful purpose, has a title against the owner of land below, and may deprive him of the benefits of the natural flow of water. The Roman law is (b) as follows:—"Et quidem naturali jure communia sunt omnium hæc, aer, aqua profluens, et mare et per hoc littora maris." It is worthy of remark, that *Fleta*, enumerating the "*res communes*," omits "*aqua profluens*." (c) *Vinnius*, in his commentary on the *Institutes*, explains the meaning of the

(a) 2 Bla. Com. 18. (b) Inst. 2, 1, 1. (c) Lib. 3, c. 17.

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text, "communis sunt quæ a naturâ ad dominum quædam prodita, in nullius adhuc digressum aut dominium pervenerunt: Hoc pertinent præcipue aer et mare, idque cum propter immensitatem, tum propter usum, quem eis commune omnibus debent, jure gentium divisa non sunt, sed relicta in suo jure, et esse primitivi, adeoque non dividi potuerunt. Item aquæ profluens, hoc est, aqua ingens, quæ vel ab imbribus collecta, vel e venis terræ catervatim perpetuum fluxum agit, flumenque aut rivum perennem facit. Postremo propter mare, etiam littora maris. In his rebus duo sunt, quæ jure naturali omnibus competunt; primum, communis omnium est harum rerum usus, ad quem naturâ comparatæ sunt, tum si quid earum rerum per ætæram occupari potest, id eatenus occupantis sit, quatenus ea occupatione usus ille promiscuus non læditur:" and he proceeds to describe the use of water, "*Aqua profluens ad lavandum et potandum unicuique jure naturali concessa.*" The law as to rivers is, "Flumina autem omnia et portus publica sunt, ideoque jus piscandi omnibus commune est in portibus fluminibusque." And *Vinnius*, in his commentary on this passage, says "Unicuique licet in flumine publico navigare et piscari;" and he proceeds to distinguish between a river and its water, the former being as it were perpetual and under the dominion of those in whose territories it is contained, the latter being a continually changing body, and incapable, whilst it is there, of becoming the subject of property, like the air and the sea.

In the Digest, book xliii. tit. 13, in public rivers, whether navigable or not, it appears that every one was forbidden to lower the water or narrow the course of the stream, or in any way to alter it, to the prejudice of those who dwelt near. Title 12 distinguishes between public and private rivers; and in section 4 it is said, that private rivers in no way differ from any other private place. From these authorities it seems that the Roman law considered running water not as *bonum vacans*, in which any one might acquire property, but as public or common in this sense only, that all might drink it or apply it to the necessary purposes

of supporting life; and that no one had any property in the water itself, except in that particular portion which he might have abstracted from the stream, and of which he had the possession; and during the time of such possession only. We think that no other interpretation ought to be put upon the passage in *Blackstone*; and that the dicta of the learned judges above referred to, in which water is said to be publici juris, are not to be understood in any other than this sense; and it appears to us that there is no authority in our law, nor, as far as we know, in the Roman law (which, however, is no authority in ours) that the first occupant (though he may be the proprietor of the land above), has any right by diverting the stream to deprive the owner of the land below of the special benefit and advantage of the natural flow of water therein. It remains to observe upon one case which was cited for the defendants, *Cox v. Matthews* (a), in which Lord Hale said, "If a man hath a watercourse running through his ground, and he erects a mill upon it, he may bring his action for diverting the stream, and not say antiquum molendinum; and upon the evidence it will appear whether the defendant hath ground through which the stream runs before the plaintiff's, and that he used to turn the stream as he saw cause, for otherwise he cannot justify it, though the mill be newly erected." What is said by Lord Hale is perfectly consistent with the proposition insisted upon by the plaintiff, and the defendants in the supposed case would have no right to divert, unless they had gained it by prescription (which is the meaning of Lord Hale), or, according to the modern doctrine, until the presumption of a grant had arisen. And this view of the case accords with the law as laid down by Serjeant Adair, Chief Justice of Chester, in *Prescott v. Phillips* (b); and by Lord Ellenborough, in *Bealey v. Shaw*; and by Leach, M. R. in his latinous judgment in *Howard v. Wright* (c). We are therefore clearly of opinion that the plaintiff is entitled to recover in respect of the abstracting of the water taken from the Over

(a) 2 Vent. 237. (b) Cited 6 East, 213. (c) 1 Sim. & Sta. 190.

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Canal Springs, as well as the other injuries complained of, and for which damages have been assessed by the jury. As to the right to recover for the injury sustained by the water being returned in a heated state, there can be no question. Whether the plaintiff could have maintained an action *before* he had constructed his mill; or applied the water of the stream to some profitable purpose, we need not decide. It may be proper, however, to refer to two cases not cited in the argument. In *Palmer v. Kebblethwaite* (a), the declaration merely stated that the water used and ought to run to the plaintiff's mill; and Lord Holt said, "suppose a watercourse run to my ground and I have no use for it, and one upon another ground divert it before it comes to mine, will an action lie? Is not this the same? must you not lay some use for it? But you will speak to it again." In the report of the same case in *Skinner* (b), *Pollexfen* in argument said, "He took it to be a clear case that the stream being the plaintiff's, the defendant could not divert it." And so held the Court, that an action had lain for diverting the stream, though no mill had been erected. The final result of that case does not appear in the books, and the roll has been searched for in vain. In *Glynne v. Nichols* (c) a similar question was raised, which appears from the report of the same case in *Comberbach* (d) to have been decided *for the plaintiff*. It must not therefore be considered as clear that an occupier of land may not recover for the loss of the general benefit of the water without a special use or special damage shewn. But be that as it may, the plaintiff in this case, who has sustained actual damage, is entitled to the judgment of the Court.

Judgment for the plaintiff.

(a) Show. 64.

(c) 2 Show. 507.

(b) By the name of *Palms v. Hebblethwaite*, Skin. 65.

(d) Page 43.

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CHELSEA WATERWORKS.

THE Governor and Company of the Chelsea Waterworks were, on 24th June, 1830, rated for the relief of the poor of the parish of St. Martin's in the Fields, in the following terms:—"For land, basin, reservoir, and tanks in the Green Park, and for water trunks and pipes there, and for their occupation of all such land and ground for the purposes of all their other water trunks and pipes laid in and underground for the supply of persons with water." Against this rate the Governor and Company appealed to the Middlesex Sessions, the magistrates at which confirmed the rate, subject however to the opinion of this Court on the following case, and subject to an amendment of the rate as to the amount, as hereinafter mentioned.

The Chelsea Waterworks Company were incorporated by an act of 8 Geo. 1, by which they are empowered, for the purpose of supplying Westminster and the parts adjacent with water, to lay down pipes and branches in or through any of the streets, &c. about that district. In pursuance of this act, engine-houses and other works were erected in the parish of St. George, Hanover Square, for which the Company are rated; and from those works pipes

By a royal warrant to the Chelsea Waterworks Company, which recited that the Company had prayed the liberty to use and enjoy the canal and old pond in St. James's Park as reservoirs for supplying the Palace of St. James's and the city of Westminster with water; and also to lay a main or mains through the said park to and from the same for the purposes aforesaid; and directed, that the petition being referred by the Commissioners

of the Treasury to the Surveyor-General, he had reported that the undertaking might be convenient to his Majesty in several ways: the King, Geo. 1, granted to the Company the said canal and old pond to be converted into reservoirs, and to be used and enjoyed by the Company as such, for the purposes aforesaid, *during the pleasure of the crown*; and also granted to them full licence to dig the ground in the said park for laying and for mending pipes and mains to and from the pond and canal. This grant was subject to conditions respecting the line of direction of the pipes, their dimensions, the mode of laying them down, and the renewal of the herbage, and also for supervision and control of the ranger of the park and his assistance in the prosecution of the works. The Company under this warrant made the reservoirs and laid pipes, and at times made repairs under the supervision of the crown surveyor, without whose permission they were restrained from making any alterations or doing repairs. The fish were taken by the deputy-ranger. The use of the canal, &c. is beneficial to the Company, but they paid no rent, and were paid for supplying the palace with water. The herbage growing on the surface of the soil in the park, including that under which the pipes passed, was rated in the hands of the ranger:—Held, that the Company were liable to be rated to the relief of the poor in respect both of the reservoirs and the pipes, as having the exclusive occupation of a portion of the soil in both cases, though for a limited purpose.

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and branches have been laid through the streets of the respondent parish. Another portion of similar pipes, and also a basin, reservoir, tanks, and water trunks, are situate within his Majesty's park, called the Green Park, in the respondent parish, and are included in the assessment. The pipes in the park are laid in the ground, and are used for the conveyance and supply of water to persons paying the Company for the same. The herbage growing on the surface of the soil in the park, including that under which the pipes pass, is rated in the hands of the Ranger of the park to the relief of the poor of the respondent parish. The basin or reservoir is also situate in the Green Park in the respondent parish, and was formerly a pond. It communicates with the last-mentioned pipes, and, together with the above-mentioned tanks and water trunks, forms part of the Company's works. In the year 1725 permission was given to the Company to make use of the pond by the following warrant:—

“Warrant to the Governor and Company of Chelsea Waterworks to convert into and use for reservoirs two ponds in St. James's Park. By the Lords Justices, &c. We, in his Majesty's name, and on his Majesty's behalf, do give and grant the commission, and licence and authority following:—*George*, by the grace of God, &c. Whereas the Governor and Company of &c. have by their petition to Us humbly represented, that being encouraged by Our royal charter they have undertaken a very great work in order to supply the city of Westminster and parts adjacent with water, which is so much wanted, and that they have so far succeeded in their undertaking that they intend forthwith to make their reservoirs and lay their mains from their machines to serve those reservoirs, but that they cannot have a proper place to make a reservoir to supply Our palace at St. James's, and the middle and lower part of Westminster, unless We shall be graciously pleased to permit them to make use of the canal or basin lately made in St. James's Park, over and against Devonshire House,

and the use of the old pond adjoining to the Deer Pen Grove there, and have therefore humbly prayed the liberty to use and enjoy the said basin or canal, and the said old pond, and to lay a main or mains through the said park to and from the same for the purposes aforesaid; which petition being by the Commissioners of Our Treasury referred to Our Surveyor General, he hath (amongst other things) reported, that this undertaking, which must be very chargeable, may be of great convenience to many of Our subjects in and about Westminster; and if the petitioners be allowed the use of the said canal and old pond for reservoirs, Our Palaces of St. James's may be constantly supplied with a sufficient quantity of water not only for common use, but for a fountain or other waterwork which We may at any time think fit to have made in our garden of our said palace; and, moreover, that the said canal, which is now dry, and the said old pond, being put into and kept in good repair and full of water, which the petitioners are willing to do at their own proper charge, will be an ornament to that part of Our said park rather than a prejudice to it; and it may be of good service to have two such bodies of water ready in case of fire. All which We having taken into Our royal consideration, are graciously pleased to gratify the petitioners in their request. Know ye, therefore, that We, for the consideration aforesaid, and for other good causes and considerations Us hereunto moving, have given, granted, and assigned, and do by these presents give, grant, and assign unto the said Governor &c., and their successors, all that the canal or basin, and all that the old pond in Our said park afore described, to be converted into reservoirs, and to be used and enjoyed by the said Company and their successors as such, and for the purposes aforesaid, for and during the pleasure of Us, Our heirs and successors. And, moreover, We have given and granted, and by these presents do give and grant unto the said Governor and Company, and their successors, and such agents, servants, workmen, and others, as the Gover-

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non and Company and their successors shall from time to time think fit to employ, full and free liberty, licence, privilege, power, and authority, from time to time, and at all times hereafter, to dig and break up the ground through our said park for laying therein pipes or mains to the old pond and canal, and from the same to such places as shall be found most proper, for conveying water to our said palace, and to the streets and lanes adjacent, and for altering and repairing such pipes, &c." Then follow certain rules and conditions relative to the direction in which the pipes were to run, the quality of the pipes, and the renewal of the grass and repairs of the walls of the park after they have been injured by the Company in laying down the pipes, &c.; with provisions for supplying the palace with necessary water at such moderate rates as the commissioners of the treasury or the lord high treasurer should think proper to direct. The ranger is also empowered to supervise the works, and see that they are performed in the mode directed by the warrant; and also to aid and assist the Company in the due and lawful execution of the powers, privileges, and authorities granted to them. Dated at the Palace of Whitehall, 29th July, 1725.

Under this warrant the Company have ever since used the pond, and have made the reservoir or basin and tank, and laid the pipes therein above-mentioned in the Green Park, and have conveyed water into the said reservoir or basin, and through it in its progress to the houses they supply. The tanks are works necessary to the reservoir or basin, and to be considered as a part of it. About two years ago, when certain improvements were being made in that vicinity, the Company were required by the crown to cleanse and re-construct the reservoir or basin, and to brick the sides and bottom, which they did under the superintendence of the Crown Surveyor; and at the same time erected tanks and other works, for the purpose of cleansing the surface of the water whilst in the basin, and preserving it at a proper level. They have also since im-

closed the reservoir with an ornamental railing, under the same superintendence, to prevent the recurrence of accidents. The Company have no interest whatever in the basin or the soil, other than is conveyed by the warrant above recited, nor do they occupy it further than above stated. The use of the reservoir is not essential to the purposes of the Company, but it is beneficial to them.

The fish in the basin has been taken by the deputy-ranger, the Company making no objection; and the Company have been always restrained from making any alterations, or doing any repairs to the basin, unless by the express permission and under the inspection of the Crown Surveyor. The Company pay no rent whatever, and they are paid for supplying the palace with water in like manner as for the supply of their other customers.

Personal property is not rated to the relief of the poor in the respondent parish. The question for the consideration of the Court is, whether any and what portion of the works in the Green Park is by law liable to be rated.

The case then stated the respective values of the various works of the Company in the park and its streets, and directed the amount for which the rate was to stand, according as the Court should be of opinion that the pipes laid in the streets and in the park, those laid in the grounds in the park, and the reservoir, basin, and works, were or were not, either or all of them, ratable. In Easter term, 1833,

Sir James Scarlett, J. L. Adolphus, and Channell, argued in support of the rate. The question is, whether the Company are occupiers within 43d of *Elizabeth*, first, of the reservoir, and then of the pipes. The language of the grant from the Crown is as clear to give a continuous and exclusive possession as any words can be; and the purposes for which the grant is stated to be made also imply that the Company were to have a control over the soil, and a continued and exclusive occupation of it. This case, it will probably be urged, comes under the authority of *Rex v.*

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*Marsey and Inceell Navigation Company (a), Rex v. Ande Navigation Company (b), Rex v. Aire and Calder Navigation Company (c).* But these were all cases of navigation, where the parties had the use of a river, merely as of a usual common highway, which, other persons also had a right to pass. There the objection was, that nothing was enjoyed but a mere easement, without any interest in the soil. Here there is exclusive property. The water, (which is impounded in the Thames,) is as much the chattel of the Company as any other valuable commodity; and the King, by allowing them to use a part of the park as a reservoir for their water, has in fact done the same as if he had allowed them to use a granary for their stores of corn and grain. The difference between the two kinds of occupation appears from the cases of *Rex v. Bell (d)*, and *Rex v. Jolliffe (e)*. In the latter case there was clearly only a right of way, and it was held not ratable; but in the former there was also a privilege of making, laying, and placing waggon ways, erecting bridges, and levelling hills and rising grounds, and excluding others, so that in fact there was an occupation of the soil as well, and it was held that such an occupation was ratable. *Dyson v. Collick (f)* is not so strong as this case, and yet it was held that the occupier might maintain trespass against a wrong-doer. It is apprehended that the circumstance of the grant being during the pleasure of the Crown, is immaterial. It is sufficient if the parties be occupants. *Lord But v. Grundall (g)*. Neither is it material that there are certain conditions imposed, for that is only like the common case of a covenant or condition for repair. To what has already been urged, it is only necessary to add an declaration of Lord Ellenborough, in *Rex v. The Mayor of Bath (h)*, which puts the question in a very clear light. He says, (speaking of the Corporation of Bath,) "that

(a) 4 Mann. & Ry. 34; 5 Barn. & Cress. 360.  
& Cress. 95.

(b) 4 Man. & Ry. 23; 3, C. per nomen *Rex v. Thomas*, 9 Barn. & Cress. 114.

(c) 4 Mann. & Ry. 728; 9 Barn.

(d) 7 T. & R. 588.

(e) 2 T. R. 90.

(f) 5 Barn. & Alders, 600.

(g) 1 T. R. 338.

(h) 14 East, 619.

they are occupiers of the reservoirs, which they are empowered to make, and in which the water, which they are also authorized to collect, is kept; and that such reservoirs, and the water kept therein, are comprehended within the legal description of land, (one of the descriptions of ratable property mentioned in the stat. 45 EH.) will not admit of a doubt.

Then as to the pipes. Assuming that the rate is good for the reservoir, the ratability of the pipes seems to follow as a necessary consequence, for they are as a part of the same reservoir, or as smaller reservoirs (a). In *Rex v. Mayor, &c. of Bath* (b), Lord Ellenborough said, "I confess I have great difficulty in distinguishing between the case of water collected in a trunk or reservoir so many yards wide, or in pipes so many inches wide, each being attached to the soil." And an observation very similar was made by the same learned judge in *Rex v. The Rochdale Water Works Company* (c), in which it was held that pipes laid under the streets, and entering the houses of inhabitants, were ratable. In *Rex v. Birmingham Gas Light Company* (d), it was indirectly, and in *Rex v. The Brighton Gas Light Company* (e), it was expressly held that gas pipes laid under ground were liable to be made the subject of a rate. The principle is well laid down in *Rex v. Mersey and Irwell Navigation Company* (f), by Mr. Justice Parke, who says, "No person can be an occupier unless he has the exclusive right to enjoy some portion of the soil. The Companies who have gas pipes, have the exclusive right to enjoy some portion of the soil; they have the exclusive right of occupying, by means of these pipes, that portion of the soil in which the main is." It is apprehended that the conditions under which the pipes are allowed to be fixed in the soil makes no difference. Bayley, B., in *Rex v. The Brighton Gas Light Company*, says, "I entertained some doubt at one time

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(a) No question was raised as to the ratability of the pipes in the streets.

(b) 14 East, 618.

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(c) 1 M. & S. 634.

(d) 1 B. & C. 506.

(e) 5 B. & C. 466.

(f) 9 B. & C. 112.

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whether the right of the Company to remove the pipes might not prevent their being ratable in respect of the increased value of the land; but upon reflection, it appears to me that that makes no difference, because they must be ratable upon the same principles as buildings are, which may be removed at the end of the term." So long as they actually enjoy the exclusive occupation of a portion of the soil, they are ratable in respect of such occupation. And if it be objected that the ranger is already rated in respect of the land under which the pipes are laid, and that the Company can only dig in the soil by virtue of a licence, the answer is, that the ranger is rated only for the produce of the surface; and that the case of *Rowe v. Brenton* (a) shews that the surface of the land may be in one party, and the substratum in another, who cannot get at it without a licence. Here there is a distinct property in the land for the laying of the pipes.

*F. Pollock and Bodkin, contra.* It cannot be contended, after the decision in *Rex v. Birmingham Gas Light Company* (b), that where a party has the exclusive occupation of the soil by means of pipes, he is not ratable. Here, the land is rated in the hands of the ranger, and then to rate the licence to occupy the sub-soil appears not supported by any authority. Suppose the occupier of a field or a house is rated, and liberty is given by him to another to lay down pipes under the field or house, would the owner of the pipes be liable to be rated? If it were so, the same property would be twice rated. Some importance seems to have been attached to that point, in *Rex v. Joliffe* (c). The reason why pipes laid under a public street are ratable is, that no one is in occupation of the surface, so as to be ratable. But that is not the case with the Green Park. [Littleton, J. Coal mines are liable to be rated, although

(a) 3 Mann. & Ry. 196; 8 Barn. & Cress. 766.

(b) 1 Barn. & Cress. 506.

(c) 2 T. R. 94.

the surface of the land is also rated:] 'Some mines are made ratable by act of parliament; and others have been held not to be ratable (a). [Parke, J. It is the *herbage* only that is rated in the hands of the ranger. He is not rated in respect of this part of the *soil*.] It would be a great hardship upon the Company to rate them for the reservoir. It is much larger than necessary. Suppose, instead of the canal in the Green Park, the Serpentine river in Hyde Park, or Virginia Water, had been allowed to be used by the Company, would the overseers of the parish in which they were situated have been entitled to rate the Company in respect of the whole occupation? There was already a pond in the park, and all that was given to the Company was, a mere licence to use it for the purpose of supplying the city with water. It is not by the licence converted into a warehouse for their water. Before the permission was given, the reservoir was not ratable, and all that the Crown gives is a permission to turn the water in and take it out again. The ordinary rule in construing a grant is, to construe it most strongly against the grantor; but in the case of a grant by the Crown, the rule is reversed. The Court must look at every part of the grant, and give to the subject as little as possible. The warrant states that the petitioners prayed the liberty to *use and enjoy* the basin or canal, and old pond, and to *lay a main* or mains through the park to and from the same. Though the language here used may, perhaps, amount to a petition for the absolute occupation of a portion of the land for the use of the mains, yet only a limited enjoyment of the basins is prayed. It is true that the terms of the granting part of the warrant are such as to give an absolute exclusive occupation of both reservoirs, and the land for the pipes. But the Crown will be taken not to have granted more than the petition prays for. The grant then must be considered only as a liberty to use and enjoy the reservoirs, by passing through them a body of water. Notwithstanding the licence, it is apprehended that the Crown

(a) *Vide Rex v. Tremayne*, ante, vol. i. 194.

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might order the Commissioners of the Board of Works to employ the water for the purposes of irrigation, or otherwise. If this be so, then the Company have no exclusive occupation. The facts of this case are analogous to those of *Re New Aire and Calder Navigation Company (a)* and *Re Mersey and Imwell Navigation Company (b)*, in which, although there was a beneficial use of the rivers, the Court held the Companies not ratable, as not having the exclusive occupation. In all the cases cited on the other side, it was expressly stated that the party rated was in the absolute possession of the soil. The only question is, has the party the absolute occupation? The case finds that the ranger takes the fish, which, though the fish may be of but little value, this may be done for the very purpose of shewing that the Company have not the exclusive possession. The Company have a mere easement.

DENMAN, C. J.—It is quite clear that the Company are ratable in respect of the pipes. The ranger is rated for the herbage only. Therefore, that part of the soil which is beneath may be in the exclusive occupation of another person, and may be rated in his hands. The Company do occupy exclusively a part of the soil with their pipes, and are therefore ratable for it. With regard to the reservoir, the terms of the grant certainly seem to contemplate some reservation, but upon this point we will take time to consider.

LITLEDALE, J.—It is quite clear that the Company are in the sole occupation of the land occupied by the pipes, and are ratable for them. A rate may be made for the soil under the herbage, as is done in the case of coal mines.

PARKE, J. concurred.

Upon the question as to the reservoirs,

*Cur. adv. vult.*

(a) 4 Mann. & Ry. 728; 9 Barn. & Cress. 820. (b) 4 Mann. & Ry. 84; 9 Barn. & Cress. 95.

of it. The judgment of the Court was delivered by Lord Chief Justice Tenterden, who, after stating the facts of the case, thus proceeded:—With respect to the pipes laid in the park, it was admitted by the learned counsel for the appellants that unless he could distinguish this case from those in which it was decided, that pipes of similar Companies laid in the streets were ratable; the rate in the present instance, in that respect, must be confirmed. The ground of the distinction was, that here another person was rated for the surface of the land under which the pipes were placed. But we are clearly of opinion that this makes no difference. That part of the soil which the Company occupied was not included in that rate. Upon this question, the Court expressed a clear opinion in the course of the argument.

The only reason for deferring our judgment was, that we might have an opportunity of more attentively considering the effect of the royal warrant under which the reservoirs were made. We have done so; and we are of opinion that it gave to the Company as much interest in the space where the reservoirs are made, as that in which the pipes are laid. It is impossible to distinguish one from the other. Their interest, indeed, in the former is expressly, in the latter by implication, at will only; but a tenant at will is, until the will be determined, an occupier of the land; and as the Company are, on the authority of the decided cases, the occupiers of the land filled with pipes, they must be considered as the occupiers of that where the reservoirs are constructed. They appear to us to have the exclusive right in a portion of the soil in both cases, though for a limited purpose only.

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Upon felony committed by surrenderor before admittance of surrenderee, the copyhold escheats to the lord.

So, although the surrender be by way of mortgage.

A WRIT of mandamus issued, calling upon the defendant and her steward of the manor of Marwell, in the county of Southampton, to admit *Henry Southwell* as tenant in fee of certain customary tenements within the manor, held by copy of court roll, described in a surrender made by one *John Boyes*, the late tenant thereof, or to shew cause to the contrary. The writ surmised the following facts:—

Within the manor of Marwell are various customary tenements demisable in fee, according to the custom of the manor, and passing by surrender and admittance; and the lord or lady of the manor, or the steward, is bound to admit upon such surrender: *John Boyes*, on the 4th of August 1830, then being a copyholder in fee, surrendered into the hands of the lady of the manor, to the use of *Henry Southwell*, certain copyholds in fee, subject to the following proviso. "Provided always, and upon this condition nevertheless, that if the said *John Boyes*, his heirs, executors, or administrators, shall well and truly pay unto the said *Henry Southwell*, his executors, administrators, or assigns, the full sum of 500*l.*, together with interest for the same after the rate of 4*l.* 10*s.* for 100*l.* for the year, on the 4th day of February now next ensuing, then this surrender to be void, or else to remain in full force." The surrender was afterwards inrolled at a general customary (a) court, held 26th October, 1830. *Boyes* did not pay the mortgage money on the 4th of February, or on any other day.

The writ concluded, that by reason of the premises *Southwell* became entitled to be admitted as tenant in fee, but that the lady of the manor had refused so to admit him.

In the return made by the defendant to this writ, after admitting the truth of the matters therein suggested, the

(a) Vide 5 Mann. & Ryl. 143 (a); ante, vol. i. 598, n.

following custom (a) was set out. "That if any customary tenant of the said manor, holding customary tenements in fee or otherwise, in and parcel of the said manor, at the will of the lord or lady of the said manor, according to the custom of the said manor, should commit felony and should be convicted thereof, he should forfeit such his customary tenements within the said manor, holden according to the custom of the said manor, to the use and benefit of the lord or lady of the said manor for the time being, and his or her heirs and successors (b) for ever."

The return further stated, that after the surrender and presentment of the tenements, *John Boyes*, the surrendoror, committed and was convicted of larceny on the 18th December 1830, and had judgment to be transported for seven years; and alleged that by reason of the commission of the said felony by *John Boyes*, and of the said conviction, the said copyhold tenements had escheated to the defendant as lady of the said manor, according to the custom of the said manor. Whereupon the defendant and her steward seized into her hands the customary tenement so escheated. Wherefore the defendant and her steward are not bound to

(a) As to the question whether it was necessary to return this custom, or whether the alleged custom is to be considered as part of the general law of copyhold, even where, as in this case; no judgment of death is pronounced, see *Bac. Abr. title Copyholds*, (L. 6,) 4th and 5th ed. vol. 1. 743; *Coke's Copyholder*, 150, 164; *Willowe's case*, 13 Co. Rep. 1, 3. But see *Jory v. Pandy*, 2 Keb. 451, 466; *S. C.* 1 Lev. 253; *Bornesford and Packington's case*, 1 Leon. 1.

(b) "Assigns" appear to be here meant. The lord of a manor, who is merely a person seised or possessed of land to which a seigniority over other land is appendant (5 Mann. & Ryl. 154), can have no "successors" in the legal sense of that term. "Successors" being

however rejected as surplusage, the word "heirs" would include assigns. *Litt. sect. 1.*

The lord must be either seised or possessed of the demesnes within and parcel of the manor. Thus if *A.* seised in fee of a manor, demise the manor to *B.* for twenty-one years, as soon as *B.* enters upon the demesnes he becomes possessed of the manor, and is truly lord for the term, though in respect of the temporary nature of his interest he is sometimes called the lord farmer. But if *B.* assigns his term in all the demesnes, or underlets them, the manor itself is suspended during the continuance of the estate of the assignee or lessee, by reason of the temporary severance of the demesnes from the seigniority or services.

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admit the said *Henry Southwell* to the said copyhold tenements, *Dampier* having moved that the return should be quashed for insufficiency, and a peremptory mandamus issued, the Court directed the case to be put into the crown paper for argument.

*Dampier* for the prosecutor of the mandamus. The surrenderor was tenant of the inheritance. The surrender was duly inrolled and presented. It was made for a valuable consideration, and was irrevocable, being subject to a defeazance, and not merely conditioned. It was an actual conveyance, not a mere agreement. The surrenderer had an immediate right to have such conveyance perfected by admission. He has never refused, but is willing to be admitted.

The lord does not object fraud, but claims by virtue of a custom, which takes effect in consequence of something subsequent to the surrender. He calls this ground of his claim an "escheat." An escheat by custom, arising from the commission of a simple felony, cannot, it is submitted, operate more effectually than or differently from an escheat by common law. It may be observed, that though in some cases a lord may claim an estate by escheat, and claim to hold it free from all equitable claims, yet generally a claim by forfeiture is always under the forfeiture, and, therefore, subject to his charges on the estate; *Walsingham's case* (a), *Rex v. Cotton* (b).

No case has been found in the books of an escheat by forfeiture intermediate between surrender and admittance. This absence of cases cannot have arisen from the fact, never having happened, when so much land is of copyhold tenure, and mortgages of such land (of which this is the common form) are so numerous. In all probability the lord, whose title in respect of forfeiture is odious in the law, has acquiesced in the claim of the surrenderer, who has paid value for the land. There being no direct authority, the case can only be determined by reasoning from analogy.

Analogous  
cases.

(a) Plowd. 559.

(b) Parker, 120.

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The case of a testator surrendering to the use of his will, and dying without heirs, declines to be an authority in favour of the crown. For in such a case the lord cannot refuse to admit the appointee under the will, by reason of a right of escheat having arisen between the surrender and admittance. It may be objected, that the testator could in his lifetime have forfeited or re-surrendered his copyhold, *Fitch v. Hackley* (a). But in this case it is clear the surrenderor could not have re-surrendered the land. Every reason for the escheat in the case of the testator is wanting in the case of the mortgagor. In the case of the mortgagor, the surrenderee is known at the time of surrender. He needs admittance only to perfect his title, and is a purchaser for a valuable consideration. In the case of the testator, the appointee is unknown, he may never exist, and needs a will (which may never be made) (b), as well as admittance, to complete his title. He takes as a volunteer, and has no claim till the will takes effect. The only possible cause of escheat is the testator's death without heirs. The lord cannot avail himself of that circumstance. Why should it avail him in this case? It seems that when the surrenderee is known, such objection is too late, where the knowledge is given by will or by the surrenderee.

In *Gowdchep's case* (c), *Isabel Gowdchep* devised that her Relation. executors should sell her land in London, where the custom was, that executors should not take till the enrolment of the will. She died without heirs. The land was holden of the King; but though the land was in his hands, it was divested by relation. By relation the surrenderee is tenant to the lord from the period of taking the surrender (d); this therefore is one ground on which the case of the crown may rest. By relation the widow may be deprived of her dower, a severance of joint tenancy caused;

(a) 4 Co. 25 a; Cro. Eliz. 441. § 169.

(b) *Restor v. Chaddington's case*, (d) 2 Wms. Saund. 422 c; m. (2) p. 155.

(c) P. 49 E. 3, fo. 16, pl. 10; Litt. § 287; *Carr v. Singer*, 2 Vez. Bro. Abr. Devise, pl. 10; Litt. sen. 603; Co. Litt. 62 a, note.

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and the issue in tail barred, though the surrender be presented after the surrenderor's death.

It may be objected, that this case is a question between the surrenderee and the lord; that the lord is a stranger, who claims an interest, and is not a mere instrument of conveyance; and that *Holdfast v. Clapham*(a) is an authority in support of the lord's claim.

The answer to this objection is,

1st. That in all conveyances of two parts, viz. completed by two acts, as by surrender and by admittance, the one shall have to the material act, viz. the admittance shall have relation to the surrender.

2dly. That one joint tenant is a stranger to another(b); that the issue in tail is a stranger to the tenant in tail surrendering, and yet both the joint tenant and issue are barred.

3dly. That the lord originally took as an instrument of conveyance merely, the interest was then in the surrenderee(c); and subsequent circumstances shall not alter his character, though they may affect the conveyance which must then be *cy-pres*.

4thly. The authority of *Holdfast v. Clapham* is impeachable. The question there related to the effect of the surrenderee's demise in ejectment against the surrenderor; and, therefore, the dictum of the Court as to this question was obiter. Perhaps the printed report is incorrect, since in a MS. report(d) by Sir *Vicary Gibbs*, then Mr. *Gibbs*, such dictum is omitted. It is probable from that MS. that the Court intended to instance the case of an heir, who before admittance has a good title against all the world, except the lord. There seems no authority for the dictum; and in the case of a surrender to the use of a will, where the surrenderee dies without heir, having made a will, the claim of the lord is barred by relation.

It will be urged on the other side, that as the lord cannot take by escheat upon the forfeiture of the surrenderee,

(a) 1 T. R. 600.

(b) *Sed vide* Co. Litt. 185.

(c) Per Ld. *Mansfield* in *Vaughan*

v. *Atkins*, 5 Burr. 2765; Litt.

"Conditions."

(d) *Penes Dampier*.

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he therefore must take upon that of the surrenderor, otherwise the lord will have no *forfeiting tenant*; that if he take not by the act of the one, he must in mere reciprocity take by the act of the other. It was said by Sir Thomas Clarke, M. R. in *Burgess v. Wheate* (a), "it is not every argument in law or logic that holds e. converso; to have reciprocal equities, there must be reciprocal rights." The lord's right is to have a *serviceable tenant*. Many cases shew that such a tenant is all that he can demand. Thus, if the mortgagor die without heirs, the lord cannot redeem; but if the mortgagee die without heirs, the mortgagee can redeem against the lord, who then in equity is a mere trustee for the redemption money (b).

If a disseisor die without heirs, the disseisee may enter on the lord (c); but if a disseisee die without heirs, the lord, having a tenant, takes nothing (d). If vendee before conveyance die without heirs, the lord takes nothing, nor can he compel a conveyance; but if vendor before conveyance die without heirs, the lord takes, subject to the vendee's claim. He must make the title, and then he holds the purchase-money as trustee only. Hence, if the lord have a tenant to do the services, there is a sufficient reciprocity. It is not necessary that the lord should have a *forfeiting tenant*. An heir before admittance cannot forfeit; that therefore is a case in which the lord has no forfeiting tenant. So again, in the case of an unadmitted appointee, there being no heir. So again, if a surrenderor on mortgage be admitted, his forfeiture does not operate to hinder the surrenderor's redeeming. There also the lord has no forfeiting tenant. Granting, however, that reciprocity should be consulted, yet as the power to alien and the power to cause escheat, seem to be equal and identical, he, who cannot alien cannot cause escheat. But here the surrenderor could not have aliened, therefore he cannot

(a) 1 W. Bl. 144; 1 Eden, (b) Co. Litt. 206 a; *Pardett v.*  
 177. And see *Roe d. Jeffereys v. Att. Gen.* Hardress, 465.  
*Hicks*, 2 Wils. 13; S. C. per nomen (c) Co. Litt. 268 b.  
 — d. *Jefferies v. —*, 1 Keny. 110. (d) *Ibid.*

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be the cause of escheat. In *Co. Litt. (a)* it is said forfeiture for felony "shall avoid all charges, estates, and incumbrances, made after the felony." A surrender by *Bayly* after the felony would have been bad. It seems, therefore, by reason of the fact, that a surrender before felony should be good. The surrender is "a charge." Even a possibility is a charge, as appears from many cases of estates to be increased or created on condition. These cases appear to be strong authorities, or at least to furnish strong analogies in favour of the prosecutor in this case, *Nichols v. Nichols* (b). If such is the law in *freeholds*, where the conveyance and alteration of possession is by solemn instrument, or by notorious fact (livery of seisin), a fortiori is it so in cases of substitution of estates *at will*.

The following passage in *Co. Litt. (c)* is also an authority in favour of the prosecutor of the mandamus. Lessee is to have the fee on payment to the lessor, "who before payment commits felony, is attainted and executed; the condition becoming impossible, no estate can arise to the lessee." The execution is the cause of the impossibility, not the felony or the attainder. The case shews that payment to the party attainted, (who is not altogether dead in law), would have bound the lord; else why mention "execution?" A feoffor on condition may enter on the lord, who is in by feoffee's escheat (d).

It may be objected, that this latter case shews merely that the surrenderor may redeem against the lord, where he takes on the admitted surrenderer's forfeiture. It shews, that where the surrenderer is the full and perfect tenant, his act shall not prejudice the surrenderor. Why, then, should the act of the surrenderor (granting that he is a full and perfect tenant till admittance) prejudice the surrenderer? It shews, also, that where the pledgor has full dominion, the land pledged passes to the lord, subject to the burthen.

(a) 390 b.

(b) *Plowd.* 483, 486, 487.

(c) 218 a.

(d) *Co. Litt.* 206; *Parlet v. At. Gen. Hardress*, 455.

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to the tenant's interest therein is not avoided by escheat; the realty is binding, the land (*a*). Again, the Crown takes the land either the state or the land is bound in this case. For an estate may exist in consideration of law with reference to a third person (the surrenderer), though as between other parties (the lord or surrenderor) it has vanished (*b*).

The lord claiming by escheat or forfeiture, affirms an estate in the forfeiting tenant. Such estate being subject to a charge, he cannot hold freed from the charge (*c*). The case of a trust may be different. But if the estate be entirely vanished, it may be contended that the land is charged by the surrender; just as a lease by a joint tenant binds the land in the hands of the survivor (*d*), or as a charge binds the land in the hands of one claiming by remitter (*e*).

A second argument on behalf of the prosecutor of the mandamus is, that the surrenderor is not a tenant so as to cause escheat. The surrenderor does not come within the words or meaning of the custom.

Second point:  
Surrenderor  
not tenant to  
cause escheat.

It is true, that in many cases and text books it is asserted, that the surrenderor is still tenant; but these may be reconciled to the position now assumed, by recollecting the subject-matter and time in which such cases were decided and such books published. The subject-matter was the copyhold estate then affirmed, though in its origin very obscure. The time was that in which the lord's interest was only to be cared for, so that something out of the usurpation of the tenant might be saved to him.

A consideration of the origin of copyholds will tend to decide this question. Originally the surrender was real, the admittance real. Both were perfect and distinct conveyances. "The lord might or might not admit at his

(a) Litt. § 66; Co. Litt. 166; 559; *Rex v. Cotton, Parker*, 120; *Saffyn's case*, 5 Co. Rep. 124 b. *Sutton's case*, 12 Mod. 558.

(b) Cases cited in Co. Litt. § 83 b.

(d) Litt. § 289.

(c) *Walsingham's case*; Dougl.

(e) Co. Litt. 342 a, 358 a, note.



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pleasure" (a). But when custom had bound the lord, both formed one conveyance. The latter was the formal, the surrender was the essential part which directed the latter. In one view "the surrenderee is in by grant of the lord" (b), in the other view, he is in by the surrenderor; and as a consequence "the lord could not charge the estate" (c). But it might be, that after the surrender the surrenderee might not appear. The lord had no right to the land. He required a tenant. Hence arose the resulting use, or rather a second estate at will, which vested in the surrenderor (d). In truth, the estate was in the lord, but the surrenderor had the profits.

The surrenderor was tenant *by fiction* to preserve the tenure. If his act affects any thing, it is, that resulting use or secondary estate at will. He cannot destroy the original estate surrendered and reposed in the lord. Escheat is no fruit of tenure. "Tenancy is the fruit," as *Spelman* says, "escheat is the tree itself." He is tenant for certain purposes only. Cases of *restricted* tenancy are well known in the law (e). Thus the vouchee, by entering into the warranty, becomes tenant to the demandant, but is not such a tenant as to be able to affect the estate. An attainted person is a tenant to some purposes (f). The deviser's heir in *Lord Stafford's* case (g) was tenant, but could not forfeit. *Cestui que use* in respect of a resulting use, is a good tenant to serve on juries (h). A disseisor is a good tenant to the lord, but an escheat from him will not bar the entry of the disseisee.

The custom in question must have been created by the lord's imposing it. He could not have instituted it

(a) *Holder v. Preston*, 2 Wils. 401.

(b) Per Lord Hardwicke, C. 2 Vez. sen. 257, in *Rigden v. Valier*; per Lord Holt, C. J. 1 Salk. 365, in *Crouther v. Oldfield*.

(c) *Taverner v. Cromwell*, 4 Co. Rep. 27 a.

(d) *Allin v. Nash*, Noy, 152; per Lord Hardwicke, 2 Vez. sen. 257.

(e) *Butler and Baker's case*, 3 Co. Rep. 29 b.

(f) Plowd. 486; Co. Litt. 2 b.

(g) 8 Co. Rep. 76 b.

(h) Litt. § 464.

at a time when admittance could have been demanded. The tenure was not then "according to the custom of the manor;" but the surrender was a complete resignation of the estate. If so, can it be contended that at the first institution of the custom the felony of a surrenderor was contemplated as being within it? It seems clear that it was meant to apply to actual *tenants*. If the custom at its foundation did not apply, it will not now apply, for it is a private custom, and induces forfeiture. It resembles a grant of consuance of actions, which applies to such actions only as were in esse at the time of the grant (a).

It will perhaps be said that the lord will be defrauded, as this is the universal mode of mortgaging.

To which it may be answered; first, that upon the grounds upon which admittance is here refused, the mortgagee will be defrauded; for he, by the defendant's argument, will lose his pledge; by my argument the lord will merely shift his tenant; secondly, that the lord cannot be defrauded of any *fruit of tenure*; since he has by the law and its fictions a triple security,—the continuing tenancy of the surrenderor for this purpose,—the relation of surrenderee's admittance,—and the necessity of such admittance being made.

Admittance must or must not be sought for. If sought for, the lord has no prejudice in tenure; if not sought for, the forfeiting surrenderor cannot interpose, and the lord may seize. In a surrender to the uses of a will, if there be no heir, the lord, on the appointee's not appearing, may seize.

It may be objected, that the surrenderor may forfeit by committing waste; in which event a change of tenants will be no answer to the lord. But this is a remote mischief. The admitted surrenderee in mortgage may commit waste, but the surrenderor may substitute himself. Hence this suggestion prejudice to the lord seems to be no answer to the claim of the mortgagee.

(a) *Mayor and Burgess of* pl. 24. Plowd. 129 b; 4 Inst. 205, *Bristow's case*, II. 14 H. 4., fo. 20, 219; Davis, 63 a.

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By the surrender the estate was vested in the lord; and therefore the mortgagor could not forfeit what he did not possess. Even in modern times the surrender is a conveyance to the lord (a). A surrender alone is sufficient at this day to bar estates-tail, and to sever joint-tenancy. A surrender may be made by husband in favour of his wife (b). This could not be if the surrender did not convey the land to the lord, and operate by his means. *Coke* (c) differs the case of a surrender from that of a grant at common law; because there, "if the grantee do not exist, nothing can pass, the grant has no operation;" but as a surrender *has* operation, it follows that something must pass. "No more shall *pass to the lord* than shall secure the limitation," *Podger's case* (d). If there be a surrender without consideration or use, the lord is a trustee. If there *be* a consideration or use the lord is a trustee. In either case the lord has the land by the surrender—the equities alone vary. A surrender is a conveyance at common law, and must therefore operate by transmutation of possession. It is like a feoffment to future uses. The feoffor takes the intermediate profits, and therefore does the services; but he cannot cause escheat (e). The taking of the profits is not the result of a perfect tenancy, but a temporary and imperfect tenancy is the result of taking the profits (f). If it be said that the surrender more resembles a bargain where the bargainor or covenantor may forfeit, and thus prevent the future uses from arising; the answer seems to be, that such acts are not *conveyances*, but mere *contracts*, capable originally of being enforced in equity only; consequently at common law the bargainor remains perfect and only tenant. The lord by escheat, as well as an innocent vendee, would have a right, and law and equity would

(a) This is so upon the surrender of a copyhold for *lives*; but nothing vests in the lord upon a surrender of copyhold of *inheritance*.

(b) 4 Co. Rep. 29 b, *Bunting v. Lepingwell*.

(c) Cop. § 95.

(d) 9 Co. Rep. 107 a; Co. Litt. 59 b.

(e) Litt. § 462.

(f) Co. Cop. § 99 f.

not interfere against them in favour of others, not having greater equity.

*Burgoyne v. Saxling (a)*, which may be quoted by the defendant, may be thus explained:—In that case there was a surrender out of Court, on condition to be void on repayment of a sum of money, before presentment or repayment; a second surrender was made; afterwards the money was repaid to the first surrenderee, and then a third surrender was made. The second surrender was held good, “for the estate was not out of the surrenderor by the first surrender.”

It must be observed, first, that the question was between the second and third surrenderees. The surrenderor having the estate *secundum quid*, would be bound by his second surrender; and if so, the third surrenderee claiming under and from him would also be bound. Suppose, however, repayment had not been made, could the second surrenderee have deprived the first of the estate? *Hale, C. J.* in a note to *Co. Litt. 62(b)*, speaking of this case, seems to answer the question. “The interest is bound by the first surrender, though the estate do not pass till presentment.”

2dly. The want of presentment was the sole ground of the decision. This appears as well from the words of *Hale, C. J.* as from those of the case. “If the first surrender had been duly presented, that would have bound the lord, so that all mesne acts done after would have been void.”

The case, therefore, is no more than that of a mortgage without delivery of title deeds, and then a second mortgage with delivery to an innocent mortgagee, or a sale in a register county without, and a second bona fide sale with registry.

But because a surrender is often in the books compared to a livery within the view, it may be objected, that, as

(a) *Cro. Car.* 273, 283.

(b) *Co. Litt.* 62 a, note 411.

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there, nothing passes till entry, so here nothing passes till admittance(a). This objection proves too much. Upon the feoffor's dying before the entry of the feoffee, the heir of the former will, at law, take the land unbound by the feoffment. But here, though the surrenderor's heir may at first take, the admittance will deprive him *ab initio*. Again, the feoffee dying before entry, his heir has no claim, whereas the surrenderee's heir, being admitted, takes *by descent*. But in truth, as between the parties livery within the view has an operation, "an interest thereby passes which cannot be countermanded," *Parsons v. Perus*(b); and it seems that the lord would in equity be bound by the inchoate conveyance(c); for the crown is bound by an equitable mortgage, *Ward v. Casberd*(d). Again, it may be objected, that in the books it is said that a surrenderee before admittance has neither *jus in re*, nor *jus ad rem*; and that he is like a *cestui que use*. The meaning of which seems to be, that *at law* he is not considered, nor can make himself tenant, save by admittance to an estate which is reposed in the lord. It does not mean that the right to admittance can be defeated by the act of the surrenderor, who has merely another estate at will of an inferior derivative and precarious character, determinable on the admittance of the surrenderee. There is no similarity between *cestui que use* of a freehold and surrenderee of a copyhold estate. The use is collateral. The feoffee to uses was complete and only tenant; he might alien. The *cestui que use* could not at law demand a conveyance; and if a conveyance had been made, it would have been a distinct and entire conveyance, having no relation to the original feoffment. The feoffee to uses seems to stand more in the place of the lord who receives the surrender than in that of the surrenderor.

A third ground for a peremptory *mandamus* is this—

(a) Co. Litt. 49 b.

*Wheate*; S. C. 1 Edep. 177.

(b) 1 Ventr. 186.

(d) 6 Price, 411; Mann. Exch.

(c) 1 W. Bla. 150, *Burgess v.* Prac. Revenue Branch, 46, 93.

the lord is bound by the inrolment; for the inrolment is the same as an acceptance, the surrender being made to the steward; and "if the lord consent to a condition or tract on the court-roll, he is bound by it" (a). If the lord allows a recovery to be suffered in his court by a copyholder for life, he cannot take advantage of the forfeiture, for he is a party; *Keen v. Kirby* (b).

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The *Earl of Kent's* case (c), wherein it was held, that if a distrainee commit treason, the king cannot have the distress without redeeming it, is not any authority that the lady of the manor in this case may retain the estate on payment of principal and interest to *Southwell*. For *Southwell* here has a right to the pledge in the first instance. A pledgor obtaining possession of the chattel, cannot defend himself against the pledgee in trover, by saying he is ready to pay (d). Nor in ejectment can the mortgagor defend himself, by saying that he is ready to redeem. *Southwell* having the pledge, will settle with the lady of the manor in equity (e). Here, he seeks the pledge by a mandamus to admit not an account. The return claims under the custom only.

*Doe d. Shewen v. Wroot* (f) shews, that before 55 Geo. 3, cap. 192, *Boyes* must have surrendered to the use of his will, for he was tenant of the legal estate. But the case of a mortgage is special. On entry of satisfaction on the court-roll, the mortgagor, without re-admittance, becomes perfect tenant, and freed from all lien. The condition and performance being on the roll, the lord is privy to and has full notice of every thing. He could not admit the satisfied mortgagee. Now, if the mortgagor before payment were not required to surrender to the uses of his

(a) Per Lord Mansfield, 1 W. Bla. 167; *Vide* S. C. 1 Eden, 177.

(b) 1 Mod. 199.

(c) Cited Plowd. 487. And see Mann. Exch. Pract. Revenue Branch, 44, 45, 48, 49.

(d) *Vide ante*, vol. i. 45 n.

(e) A lord refusing to admit the mortgage-surrenderee would probably be considered in equity as holding the escheat as trustee for such surrenderee to the extent of the mortgage debt.

(f) 5 East, 132; 1 Smith, 363.

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will, his appointee, on payment, might have a right to admittance without any surrender, which is against the notion of copyholds. There being no re-admittance of the mortgagor, is the sole ground of the decision in *Doe v. Wroot*. The other case is that of *Peachy v. The Duke of Somerset*(a). Copyhold tenant of inheritance surrenders in strict settlement—no admittance. He having an infant son commits a forfeiture. Lord *Macclesfield* thought that the whole estate of inheritance was forfeited. But the infant's case was not before the Court. He might never apply. The forfeiting tenant was actually tenant. This opinion was grounded on the necessity of there being a forfeiting tenant, and on the capability of a trustee at common law causing an escheat; but many cases shew that a tenant may have no power to forfeit, and that a trustee is essentially different from a surrenderor. Hence, either because of relation, or because of the lien on the estate or land; or because the surrenderor is not perfect tenant, or because the lord is privy to the condition, the prosecutor is entitled to a peremptory mandamus.

*Philip Williams, contra.* The applicant complains of the hardship of the case, and requests this Court to decide the question in the same manner as a Court of Equity would do. This Court has no jurisdiction similar to a Court of Equity, and if the estate is not held to be forfeited, considerable injustice will be done to the lady of this manor. *Southwell* might have claimed admittance at all events in February, if not immediately. His negligence was the cause of his not being admitted. If the surrenderer had committed felony, would the estate have escheated to the lord? [*Littledale, J.* Certainly not.] Then it would be unjust to the lord to deprive him of his escheat, in case of the commission of felony by the surrenderor; and by a trick of this description allow him to be defrauded of his right of escheat. If the estate in this case does not escheat, *Southwell*, although he had advanced one pound only on the estate, would get pos-

(a) 1 Stra. 447; Prec. in Chanc. 568.

session of it, and hold it against all the world. It may be urged that there is some kind of equity of redemption which would obviate this. But the lord would not have the right to redeem (a). The person, therefore, likely to be injured by this surrender, is the lady of the manor. The Court will not be inclined to decide against the right of escheat in this case, since the forfeiture is occasioned by the criminal act of the surrenderor, and is part of the punishment by law inflicted upon him. All the cases which have been cited have relation to the rights of the surrenderor and surrenderee, inter se, and where the right of the lord or any third party has not come in question. With respect to the case of a testator surrendering to the use of his will; after the surrender, the testator may make a conveyance of the estate, and by this means destroy the effect of his own surrender. The property, in fact, after the surrender, is in him, and he has the power to grant, and is liable to forfeiture. It is admitted that the surrenderor, having surrendered once, cannot make a second valid surrender; but the reason is, that he will not be permitted by law to do injustice. *Holdfast v. Clapham* (b), which has been attempted to be distinguished (c), is in point. *Roe d. Jeffereys v. Hicks* (d) shews that the lord is entitled to have a tenant liable to forfeiture, either in the person of the surrenderor or of the surrenderee. The utmost which the case of *Burgess v. Wheate* (e) can be taken as deciding was, that a Court of Equity, situated as the parties were, would not give that assistance to the parties which they had not at law. No doubt in that case dicta may be found favourable to both sides of the question. As to *Taylor v. Wheeler* (f), if the party is entitled to the aid of a Court of Equity, he need not apply to this Court. The surrenderee may have an equitable lien; if he has, he should apply to a Court of Equity for assistance, and not to a Court of Law. It has been said that in the case of the heir there is no forfeiture

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(a) *Ante*, 780.

(b) 1 T. R. 601.

(c) *Ante*, 780.(d) *Ante*, 781.(e) *Ante*, 781, 788.

(f) 2 Salk. 449.



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until admission; and that in the meantime the estate is vested in him. This may be admitted; but in the case of the heir the lord has the power, whenever he pleases, of calling upon the heir to be admitted, and it is the lord's own negligence if the heir is not admitted. In this case it was the fault of the mortgagee that he was not admitted. It is then said that the right of escheat and capacity to alienate always exist together, and that the surrender is a charge either on the estate or on the land. For the former of these propositions there is no authority, and granting the latter to be true, the surrender is only a charge in equity, and to a Court of Equity the party must apply. [*Taunton, J.* We cannot sit as a Court of Equity in this case, because if we discharge the mandamus, we cannot give to the party his principal and interest.] This is not a case of relation. All the cases in which the doctrine of relation has come in question are as between the surrenderor and the surrenderee. The original state of copyholds has been referred to in order to invalidate the custom, but that question is not before the Court. *Crouther v. Oldfeild* (a) was cited, to shew that the surrenderee is in by grant from the lord. This may be admitted; but it does not follow that the property is in the lord, in the interval between the surrender and the admittance. In *Taverner v. Cromwell* (b), it is said that the surrenderor is in after the surrender, that the lord may not lose the fruits of the tenure. In all the cases, the doctrine of relation is laid down with regard to the conveyance between the parties, not with reference to the interests of these persons. In *Burgoyne v. Spurling* (c) the question was between the parties. There is no analogy between civil death and a conviction for felony. *Parsons v. Perus* (d) is therefore inapplicable. In *Doe v. Wroot* (e) the mortgagor must have been in possession, or he could not have surrendered to the use of his will.

This case depends upon two questions—could *Boyer's* conviction make him subject to forfeiture, if no surrender

(a) *Ante*, 786.

(d) 1 Vent. 186.

(b) *Ante*, 784.

(e) 5 East, 132; 1 Smith, 363.

(c) *Ante*, 787.

had taken place? Secondly, does the surrender protect the estate, or, in other words, was *Southwell* or was *Boyes* tenant at the time of the act of forfeiture?

The cases on this subject are collected in a note to *Grantham v. Copley* (a), and it is there laid down that the admission relates to the surrender, and that the surrenderee's title begins from the date of it; *Benson v. Scot* (b). But this relation exists only between the parties. In *Carr v. Singer* (c), the question was between the parties, and the case turned principally upon another point. *Roe v. Griffiths* (d) was a question between the parties; and Lord Mansfield there said, this case is directly within the principle of *Selwyn v. Selwyn* (e), that the whole of a conveyance shall be taken together, and the several parts of it shall relate back to the principal part. In *King v. Lorde* (f) and *Parker v. Edith Bleeke* (g), the doctrine of relation was laid down, but in neither of those cases was the interest of the lord in question. It is submitted that until the admittance of the surrenderee, the surrenderor is tenant to the lord. This was laid down in *Rex v. Boughey* (h). In *Holdfast v. Clapham* (i), *Ashhurst, J.* says, "As against all persons, but the lord, the title of the surrenderee, after admittance, is perfect as from the time of the surrender, and shall relate back to it." It was determined in *Berry v. Greene* (k), that until admittance, the surrenderor continues tenant. *Fitch v. Hockley* (l) is an authority for the same position. In *Smith v. Triggs* (m), *Fitch v. Hockley* is recognized in this manner by *Pratt, C. J.*: "Consider it first upon the surrender; that we all know was an instrument by which the lord took nothing, and the estate, notwithstanding, remained in the surrenderor; this is plain from *Cro. Eliz.* 441, where the tenant made a second surrender, and it was adjudged for

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(a) 2 Wms. Saund. 428 b.

(b) 1 Salk. 185.

(c) 2 Vez. sen. 603.

(d) 4 Burr. 1952; 1 W. Bla. 605.

(e) 2 Burr. 1131; 1 W. Bla. 222.

(f) Cro. Car. 204.

(g) Cro. Car. 563.

(h) 1 Barn. &amp; Cressw. 565.

(i) 1 T. R. 601.

(k) Cro. Eliz. 349.

(l) Cro. Eliz. 441.

(m) 1 Stra. 490.

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the second surrenderee; upon the bare surrender, therefore, nothing passes, and the lands will descend notwithstanding."

In *Vin. Abridg.* title Copyhold, (B. b) pl. 6 (a), it is said, "A surrenderor of copyhold land continues seised till the admittance of the surrenderee; and the person to whose use the surrender is made, is not cestui que use in the meantime, but when admitted, he is in by grant from the lord, per *Holt, C. J.*" *Vin. Abridg.* title Copyhold, (D. b) pl. 8, (b). In *Roe v. Hicks* (c), the Court determined that if the surrenderee be attainted and hanged before admittance, the lands shall not be forfeited to the lord. *Com. Dig.*, title Copyhold, (G. 3.) (G. 1.); *Kenebel v. Scrafton* (d).

The lord will be prejudiced if the surrenderor be not considered tenant, as he may lose his heriot. [*Taunton, J.* For some purposes the surrenderor is admitted by Mr. *Dampier* to be tenant.] If the surrenderor is not tenant, he will not be liable to pay a heriot. The surrenderor cannot be tenant for some purposes and not for others. The lord has the means of compelling him to perform his services, but has no means of controlling the surrenderee. There is a manuscript note of Mr. Serjeant *Hill's*, in Lincoln's Inn library, to the case of *Hurst v. Morgan*, in which it is said that a surrender does not operate by transmutation of possession, and that the estate continues in the surrenderor.

The effect of the decision in *Tredway v. Fotherley* (e) was, (although the case was one of extreme hardship,) that a Court of Equity will not relieve against the lord where the party has no remedy at law. In *George d. Thornbury v.* — (f), it is said "The lord can never be considered as a trustee in whom the land is to vest for the benefit of the devisee, for it appears plainly by *Popham*, 174 (g), 4 Co. 23 (h), and *Cro. Eliz.* 441 (i), that whenever the fee simple, &c. of a copyhold

(a) 6 Vin. 78; citing *Fisher v. Wigg*, 1 P. Wms. 17.

(b) *Ib.* 80, citing *Arnold v. George*, Yelv. 16.

(c) 2 Wils. 13.

(d) 8 Ves. jun. 30.

(e) 2 Vern. 637.

(f) Amb. 627.

(g) *Welden v. Vesey*.

(h) Copyhold cases.

(i) *Fitch v. Hockley*.

is by surrender limited to the use of a will, the fee simple remains in the copyholder; and is not vested in the lord. Therefore he cannot be considered as a trustee, having no estate vested in him for that purpose." The principle established by all the cases is, that the surrenderor is, until admittance, for all purposes tenant to the lord. There is no hardship upon any one; and if the contrary be held, copyhold tenants may elude every act of forfeiture, by making a nominal mortgage for a small sum of money.

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*Dampier*, in reply. *Treadway v. Fotherley* (a) depended entirely on a custom to compel the surrenderee's admittance, and equity would not interfere against such custom; that case applies not here, where no such custom exists. On applying a mandamus, it is generally confessed, that a remedy *at law* is wanting. Hence this Court is on such application a Court of Equity, as it is in very many cases whenever it notices equitable rights and interests distinct from legal possession. It may not choose to interfere and take an account, not having proper ministers or means to enforce an account (b). But where admittance simply is the remedy, it will interfere. If the Court of Chancery would decree a re-admittance, then in these times the Court of King's Bench will command it. The lord, if he be entitled to an account, may apply to equity. We seek *possession* only; we want no account from the defendant, though we are willing in a proper place to render one. *Southwell* has been guilty of no laches; he has not forfeited his title to admittance by not claiming it on the earliest court day. The argument of the defendant on this head must go all lengths. It must extend to this, that as some interval must occur between a surrender and admittance, even when both are at the same court, an act by the surrenderor in that interval shall prejudice the surrenderee, who cannot help himself. Many cases have been cited which shew, that a tenant may be substituted on a lord claiming by

(a) 2 Vern. 367.

(b) *Sed vide Godfrey v. Saunders*, 3 Wils. 73.

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escheat. Such are cases of freehold; but if it be so in a freehold, it is so *à fortiori* in a copyhold, where the freehold is in the lord. The copyhold is a shifting estate; there is not that difficulty in the creation or disposal of an estate at will which exists with respect to a freehold.

It has been said that illusory mortgages will be made. Granting this, it is only a balance of inconveniences; but the lord may protect himself. He may refuse to accept the surrender; and no court will compel him to accept if he shew the fraud. He will always have a tenant to do the services; and if the surrenderor forfeit what tenancy he has, the lord may call in and compel the surrenderer to become tenant; *Clayton v. Cookes (a)*.

A heriot would be due on *Boyes's* death, for he is tenant *secundum quid*, and heriot is a fruit of tenure (*b*);

(a) 2 Atk. 449.

(b) *Snag v. Fox*, Palm. 342.

Where a heriotable tenement is severed, the lord is entitled to several heriots in respect of each portion.

And the liability to pay several heriots continues after the portions are reunited, if during the severance the lord has had seisin of the several heriots.

A question has sometimes arisen whether the lord is entitled to distinct heriots-service, when a heriotable tenement is reunited after severance; the solution of which appears to depend upon one ancient and three modern cases. If the language in which the former is alone to be found had not become nearly obsolete amongst lawyers, the late decisions would probably not have occurred.

In Fitzh. Abr. *tit. Heriot*, pl. 1, is a case decided in 34 *Edw. 3*, which is not printed in the Year Books, but is to be found also in Statham's Abridgment, *tit. Heriot*, pl. unicum.

The case is thus stated by Fitzherbert: "If my tenant who holds of me by a heriot, alien part of the land to another, each of them is charged to me with a heriot, because it is entire; and although the tenant purchase the

land again, still if I be seized of the heriot by the other man, I shall have of him for each portion a heriot; by the opinion of Wil. (In Statham the name is given at length, *Wilugby*,) and Shard in Replevin." "*Si mon tenant que tient de moy par un hariot, alien parcel de sa terre a un autre, chescun de eux est charge a moy d'un hariot, pur ceo que il est entier; et mesqz le tenant purchace le terre arrer, uncore si jeo soy seisie del hariot par l'autre home, jeo aver de luy pur chescun porcion un hariot, par opinion Wil. et Shard. in Repl.*"

This passage may be thus paraphrased: "If my tenant who holds land of me subject to the payment of a heriot, alien parcel of that land to a stranger, each parcel of the land, as well that which the alienee takes as that which remains in my original tenant, the alienor, becomes chargeable with the same heriot as the whole

but it does not shew that *Southwell* has no right to admittance, A heriot will be equally due on death of *Southwell*

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estate was subject to previously to the alienation, because heriot being an entire thing, is not apportionable among the tenants; and although the original tenant purchased back from the alienee the parcel which he had so aliened, I shall be entitled to demand of him a separate heriot in respect of each parcel; *provided during the severance I obtained actual seisin of the newly created heriot, by receiving it from the alienee.*"

The second case is that of *Attree v. Scutt*, (6 East, 476; 2 Smith, 449,) where in an action brought by the steward of a manor, this Court held, that the devisees of a copyhold, holding as tenants in common, have several estates, to which they must be severally admitted, and for which several services are due to the lord, and several heriots on the death of each tenant; and that the multiplication of heriots and of fees on admission still continues notwithstanding the re-union of the same land afterwards in one person, on the ground that the estates or interests in the land, once divided in severalty, continue several.

*Attree v. Scutt* professed to be decided upon the authority of the case in Fitzherbert; but in delivering the judgment of the Court, Lord *Ellenborough* (6 East, 483,) translates the proviso thus: "Yet if I were seised of the heriot by another man." This mode of rendering the latter words destroys the whole force of the proviso, and renders the passage unintelligible;

no further notice, therefore, is taken of it in this judgment, which proceeds not upon Fitzherbert's distinction of seisin or no seisin of the new heriot, but upon the completeness or incompleteness of the coalescing of the several parts of the old estate when again re-united in one owner. This judgment goes, therefore, in effect, much further than the authority in Fitzherbert, as it would extend to a case in which the re-union had taken place before any heriot had become payable since the severance.

The third decision is *Garland v. Jekyll*, (2 Bingh. 273; 9 B. Moore, 620.) In that case the Court of C. P. held generally, and without exception, that a copyhold which, when in the hands of a single owner, pays but one heriot, but from which distinct heriots are payable whilst divided amongst several owners, shall again pay but one heriot if it again become united in the person of a single owner.

This case, though in direct contradiction to the decision in *Attree v. Scutt*, would go the full length of deciding the question. In *Garland v. Jekyll*, however, the whole effect of the case in Fitzherbert does not appear to have been presented to the Court. In K. B. we have seen the proviso so translated as to make it inoperative; in C. P. it was omitted altogether, and the case itself was stated to be "a loose note, probably the decision of a judge at nisi

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if he had been admitted, still *Boyes* would have a right to admittance. In truth, all the cases of supposed incon-

prius, *not to be found in any one book of authority.*" Yet in *Com. Dig. Copyhold*, (K. 19,) it is said, "If tenant by heriot service aliens parcel, the heriot shall be multiplied, *Fitz. Heriot*. 1. And if the lord be seised of an heriot by the alienance it continues, though the tenant repurchase the parcel." And though *Brooke* does not cite this particular case, he says, (title *Heriot and Mortuary*, pl. 10) "Plus istarum, titulo *Harryot*, in *Fitzherbert*;" and in pl. 8 he distinguishes between the custom of heriots, which runs with the seignior, and other customs, which run with the tenancy; which distinction goes to confirm the view which has just been taken under the authority of the proviso in *Fitzherbert*, namely, that it is the seisin of the lord, and not the estate of the tenant, which is to be chiefly considered. Again, in *Bruerton's* case, 6 Co. Rep. 1 a, Lord *Coke* says, "And as to heriot, vide 34 E. 3, *Heriot* 1," which is the mode by which Lord *Coke* uniformly refers to original cases in *Fitzherbert*. And in *Talbot's* case, 8 Co. Rep. 105 a, he says, "also they cited the book in 34 E. 3, *Heriot* 1, where it was held, that if my tenant who holds of me by a heriot, aliens parcel of his land to another, each of them is chargeable to me of a heriot, because it is entire; and although the tenant purchase the land again, &c., I shall have of him for each portion a heriot." It is also cited in *Scroggs, Court Lect.* 157.

After adverting to the supposed

absence of any recognition of the authority of the case in *Fitzherbert*, the Court of Common Pleas says, (2 Bingham. 301,) "But it is to be found in *Kitchen on Courts*, 269, and in a way that shews it was greatly mistaken by *Fitzherbert*. Let us see how it appears there. He refers to *Fitzherbert*; he thought it not an authority, and he stopped short at the point at which we stop. He makes the tenants in common, while they continue in common, pay several heriots, but he goes no further." It is true that *Kitchin*, in page 269, cites only the first part of the case in *Fitzherbert*; but so far is this writer from disapproving of the remainder of the case, that in page 271 he sets it out verbatim, not indeed as taken from *Fitzherbert*, but from *STATHAM*, (*Heriot* pl. unicum,) who, whilst his abridgment corresponds nearly word for word with *Fitzherbert*, inserts the case as being one also originally abstracted by himself.

The third case, *Holloway v. Berkeley*, (9 Dowl. & Ry. 83, 6 Burn. & Cressw. 2,) proceeds upon the distinction between an absolute severance by alienation of part, and a quasi severance by creation of a tenancy in common; (as to which, however, see *Bruerton's* case, 6 Co. Rep. 4.) In this case, also, the Court seems to have adopted the same limited view of the case in *Fitzherbert* as had been taken in *Garland v. Jekyll*.

The exaction of distinct heriots from a tenant, whose estate has been at one time subdivided, has

venience cited by the defendant, appear to be cases where no person is forthcoming as a substituted tenant, whereupon the lord has his remedy by seizure; or are inconveniences which equally exist in the case of an admitted mortgagee, or a conditional devisee. The mortgagee or heir may forfeit by simple felony, attainder, or waste, still the mortgagor may demand re-admittance, the devisee will have his estate. The MS. case of *Hurst v. Morgan*, wherein Lord *Hardwicke* says, "the estate does not pass by the surrender," extends only to say that it does not pass to the *surrenderee*. The question here is, whether it does not pass in such a way to the lord; that the surrenderor cannot forfeit in perpetuum. If the surrender be ineffectual, why does the defendant insist on admittance? for admittance is *by and from* the lord; and so is the pleading. Why must the admittance follow the terms of the surrender, if that have no effect? But if the surrender and admittance are *one* conveyance, then it is clear that the former is the essential part to which all the others shall have reference. "It enures as an executory conveyance." The estate may not immediately pass to the surrenderor, but the "land is charged"(a). If they are two conveyances, then the question does not arise, for the surrender having conveyed the estate from the

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been characterized as hard and oppressive. It may however be observed, that the increased burthen is not occasioned by the *re-union* of the disjunct members, but accrued by the original severance, upon the consequences of which, inconsistently enough, no such complaint is made. Nor does the question appear to depend upon general principles of *copyhold* law, the right being of higher antiquity than copyhold tenure, and of greater legal extent, the old books containing few decisions with reference to heriots of copyholds, but treating largely of

those due in respect of freehold estates. *Attree v. Scutt*, and *Garland v. Jekyll*, appear to have been cases of heriots-custom; but as it was assumed that they were of the same nature as the heriot in 34 *Edw. 3*, which was clearly a heriot-service, these decisions seem to be rather authorities (such as they are) in respect of heriots-service than of heriots-custom, the right to which will perhaps be found to rest upon distinct grounds. *Vide Mann. Exch. Prac.* 2d edit. Revenue Branch, 341, from which the substance of this note is taken.

(a) *Co. Litt.* 217; *Plowd.* 486.



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surrenderor, his act cannot cause a forfeiture of that which he has not.

LITTLEDALE, J. (*a*), in Trinity term, 1839, delivered the judgment of the Court: After stating the mandamus and return, his lordship proceeded thus:—

The question is, whether, if a copyhold tenant surrender his estate to the use of another, and afterwards commits and is convicted of felony before admittance of the surrenderee, the estate is by the custom forfeited to the lord.

The case was argued before us very elaborately, and all the authorities were fully entered into. The Court did not at the time feel greatly pressed by the weight of those authorities, but as they were numerous, and the argument was chiefly from analogy, we wished to look into them. After a careful examination of them we are of opinion that the estate is by the custom forfeited to the lord, and that a preceptory mandamus ought not to issue.

Surrenderee  
 not affected by  
 mesne incum-  
 brances.

It is conceded, that as between the surrenderor and the surrenderee, the latter cannot be prejudiced by any act done by the former subsequently to the surrender, but is entitled to be admitted to the estate free from all mesne incumbrances.

Surrenderor,  
 tenant for pur-  
 poses of ser-  
 vice.

It is conceded also, that the surrenderor, until the admittance of the surrenderee, continues tenant to the lord *for all purposes of service*. The estate therefore does not by the surrender *vest* in the lord.

Nothing in  
 surrenderee  
 before admit-  
 tance.

It is conceded also, that the surrenderee before admittance takes nothing, but that on admittance he is in by relation from the time of the surrender, as between him and the surrenderor; yet he has not been tenant in the mean time; for it is distinctly held in *Doe d. Jefferies v. Hicks* (*b*), that if he be attainted in the mean time, the lord will not take by forfeiture.

First point:  
 Surrenderor,  
 tenant for pur-  
 pose of for-  
 feiting.

If then no act of the surrenderee before admittance will work a forfeiture, and if it were held that the surrenderor

(*a*) *Denman*, C. J. was absent when the case was argued.

(*b*) 2 Wils. 15; 1 Kenyon, 110.

There the surrenderee never was admitted, so that no question as to *mesne* acts could arise.

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after surrender, although he be tenant, cannot by any act of his work a forfeiture, it would follow, that a considerable time might elapse during which the lord's right of escheat would be suspended; and that, not by any act of his own, but by the acts of others which he could not prevent; for he can neither refuse to accept a surrender, nor compel a surrenderee to come in and be admitted. We do not find any authority for such a proposition; on the contrary, it is laid down by Lord Macclesfield in *Peachey v. Duke of Somerset* (a), that the lord must always have such a tenant upon his lands as may be sufficient to answer all demands and capable of committing forfeitures.

There are many authorities relating to freehold estates, and some relating to copyholds, which shew that the tenant shall forfeit only that which he has; and, therefore, in *Paulett v. Attorney-General* (b), (which was a case of freehold), it was held, that a mortgagor had a right to redeem against the crown, where the mortgagee in possession had been attainted. But it is plain that in that case, Hale, C.B. sitting in equity, treated the mortgagee's interest in the land as a mere pledge and security for money. It is no authority whatever for saying, that the estate was not forfeited to the lord *at law*.

It was argued that the Court, in cases of mandamus to admit copyhold estates, frequently looks to *equitable* interests. But without at all denying that this may be so in some instances, it seems clear that this Court cannot, in such a case as the present, enter into a question of trust, or adjust the equitable rights of the parties.

Upon the whole, without minutely examining all the cases cited by the learned counsel for the surrenderee, we are of opinion, that as the surrenderor is conceded to be tenant for all purposes *of service* until the admittance of the surrenderee, so he is also tenant for the purpose *of forfeiting*.

One point more remains. Mr. *Dampier* argued that the Second point: Custom.

(a) 1 Stra. 454.

(b) Hardress, 465.

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custom here stated could not apply to such cases as the present, because the custom to be valid must have existed before the time of legal memory, at which remote period the surrender and admittance were not one conveyance as now, but the estate vested by the surrender in the lord, and was regranted by him at the time of admittance; so that in the interval between surrender and admittance there was no tenant at all, but the estate was in the lord. But this argument proves too much, for it shews that whenever there was a tenant, such tenant might by the custom commit a forfeiture; and as soon as ever a surrenderee came to be considered as tenant until admittance of surrenderee, the estate was no longer held to vest in the lord, the custom as to forfeiture immediately attached on such tenant; if it did not, neither would any other of the customs; and the lord would at this day have no tenant at all between surrender and admittance. It is conceded, however, that he has a tenant for the purpose of *services*—why not, also, for the purpose of *forfeiture*? The consequence is, that this rule must be discharged.

Rule discharged.

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FINNEY v. MONTAGUE.

An alias bill of Middlesex may be signed by the seal usually affixed to a writ of summons, since the Uniformity of Process Act.

**KNOWLES** in Michaelmas term applied for a direction to the signer of the writs of summons for this Court, to affix his seal to an alias bill of Middlesex, which had been issued to continue a suit commenced before the *stat.* 2 Will. 4, c. 39, which directs the commencement of actions by writs of *summons*. The office of signer of bills of Middlesex being abolished by that statute, the seal of office had no longer any effect. The officer appointed to sign writs of summons objected to affix his seal to a bill of Middlesex, on the ground that his seal was not applicable to any writ but a writ of summons. It was urged, that unless this seal were affixed to the alias bill of Middlesex,

there was no mode of continuing the action, and the plaintiff would be barred by the statute of limitations.

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The Court intimated an opinion that the officer ought to affix his seal to the alias bill of Middlesex, which was accordingly done.

STOW v. DAVENPORT.

**ASSUMPSIT** to recover 709*l.* 15*s.* paid by the plaintiff for legacy duty, alleged to be due in respect of an annuity of 500*l.* bequeathed to the wife of the defendant, formerly *Mary Ann Frisby*. At the trial at the sittings after Hilary term, 1832, a verdict was taken for the plaintiff, damages 1000*l.*, subject to the opinion of this Court upon the following case:—

*Thomas Frisby*, by his will dated the 21st day of July, 1811, bequeathed all his real estate to three trustees, in trust to convey the same to the use of *Thomas Frisby*, the younger, for life, with a limitation to the use of the trustees, during the life of *Thomas Frisby*, the younger, to preserve contingent estates, and after the decease of *Thomas Frisby*, the younger, in case *Mary Ann Frisby* should survive him, to the use that she should take from and out of the said premises such annuity or yearly rent charge not exceeding 500*l.* per annum for her life, as *Thomas Frisby*, the younger, should by will or codicil thereto in writing appoint; the same annuity to be paid to her, clear of all taxes and deductions whatsoever, by four quarterly payments. In default of issue of *Thomas Frisby*, the younger, the testator devised the said premises, charged with the annuity or

*A.* devises real estates to *B. & C.* in trust to convey to use of *D.* for life, remainder to *B. & C.* for *D.*'s life to preserve contingent remainders, remainder to the use that *E.* shall take out of the premises such annuity or yearly rent charge not exceeding 500*l.* per annum for her life, as *D.* shall appoint; such annuity to be paid to her clear of all taxes and deductions whatsoever; and in default of issue of *D.* the testator devised the premises

charged with the annuity or rent charge to *F.* *D.* appoints that the annuity shall be the full annuity of 500*l.* *D.* dies. *F.* enters, and is compelled by Exchequer process to pay the legacy duty on the annuity: Held, first, that the annuity was chargeable with legacy duty; secondly, that the legacy duty is a "tax" within the words of the devise; and thirdly, that *F.* takes the land subject to the payment of legacy and legacy duty, and cannot call upon *E.* for repayment of the legacy duty.

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rent charge above mentioned, to the use of the plaintiff for life, with remainders over. And the testator, after giving specific legacies, bequeathed all his personal estates to his executors, upon trust to convert the whole into money, and lay out the same in the purchase of real property, to be conveyed to the same uses and trusts as were limited of and concerning the estates devised by the will: Provided that it should be lawful for the trustees to place the said personal estate in the funds till a convenient purchase of lands could be found; the dividends to go to the person to whom the rent of the lands to be purchased would have gone. The testator appointed *Thomas Frisby*, the younger, and *John Turvey* (who was also one of the trustees,) executors of his will.

*John Turvey*, by a deed, dated 1st January, 1812, disclaimed (a) the estates devised and the trusteeship. By indentures of lease and release of the 13th and 14th April, 1813, all the parties interested joining, granting, and confirming the devised premises to *Edward Manners*, to the use of *Thomas Frisby*, the younger, for life, and after his decease, in case *Mary Ann*, his wife, should survive him, to the use that the said *Mary Ann* might receive and take out of the same premises such annuity or yearly rent charge not exceeding 500*l.* per annum, clear of all taxes and deductions whatsoever, as *T. Frisby*, the younger, by his will should appoint.

13th June, 1813. *Thomas Frisby*, the younger, by his will directed and appointed that the annuity should be the full annuity of 500*l.*

April, 1820. *Thomas Frisby*, the younger, died.

The plaintiff entered into possession of the devised premises, and into the receipt of the dividends arising from the personal estate of *Thomas Frisby*, the elder, paying *Mary Ann Frisby*, the widow of *Thomas Frisby*, the younger, the annuity of 500*l.*

In 1831 the defendant married *Mary Ann Frisby*.

(a) Vide 4 Mann. & Ryl. 189, (a), 190, n., as to the supposed efficacy of a disclaimer by deed.

1824. The two trustees of the will of *T. Frisby*, the elder, laid out all the personal estate of *T. Frisby*, the elder, except 624*l.* 3*q*. per cent. annuities, in the purchase of land, which was conveyed to them in fee, subject to such of the trusts of the will of *T. Frisby*, the elder, as were then subsisting and capable of taking effect.

In Hilary term, 1830, an information, of which the defendant had due notice, was filed in the Exchequer, by the Attorney-General, against the plaintiff, for non-payment of the legacy-duty on the annuity. Upon this information judgment was entered up for the crown, and the plaintiff was obliged to pay, and did pay, in satisfaction thereof, 709*l.* 15*s.*, the amount of the said duty, together with 38*l.* 9*s.* 3*d.*, the costs of the crown (a). For these two sums, making together the sum of 748*l.* 3*s.*, this action is brought.

The questions for the opinion of the Court are:  
1. Whether the annuity was subject to the legacy-duty.  
2. Whether the defendant is liable to the payment of such duty.

*F. Kelly*, for the plaintiff. The Attorney-General v. *Jackson* (b) is decisive to show that this legacy, though payable out of land, is liable to the legacy duty. In the judgment in that case not one word is to be found which does not apply here. This is an annuity, and it is called so in the will.

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First point:  
Whether  
legacy  
duty attaches.

The other question is, whether, supposing the legacy-duty payable, the defendant is liable to repay the plaintiff; and this point appears equally clear with the former. No question as to the effect of the words, "clear of all taxes and deductions," can arise between the testator and the legatee. If in this case the legatee is entitled to the annuity clear of the legacy-duty, the amount of the duty must be paid by the executor out of the residue of the personal estate; but if there be no residue, it must be paid out of the legacy.

Second point:  
Whether  
chargeable on  
legatee.

(a) Mann. Exch. Pra. 2d ed. 429. (b) 2 Crompt. & Jervis, 101.

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A bequest of a legacy, free of the legacy duty, is a bequest of something more than the legacy : it is a bequest also of the amount of the legacy duty out of the residue (a). But the particular terms of the will do not affect the right of the crown, to whom the tenant of the land is liable to pay in the first instance. The tenant having paid, may recover from the legatee, who may, in his turn, recover in equity against the executor, if there be a residue. *Hales v. Freeman* (b) appears to be quite conclusive upon this part of the case. There, by will, the land was devised to trustees; and an annuity of 100*l.*, clear of all deductions, bequeathed and secured upon the land ; and it was held, that the trustees, who paid the legacy duty, might recover against the legatee. It was not even suggested there that the trustee might recover against the executor. The *tertenant* is clearly not the person in this case ultimately liable ; and having, under the compulsory process of the crown, paid the money, he may treat the legatee as his debtor. The legatee is undoubtedly the party who is the debtor of the crown for the amount of the legacy duty, and if the legacy is to be free of duty, the legatee has his remedy against the executor. If the legacy is to be free of legacy duty, then the amount of the duty is itself a legacy, and the *tertenant* having paid this legacy, which is to be paid out of the residue, and having no means of recovering the amount from the executor, must look to the legatee. [Parke, J. Perhaps it will not be conceded to you that the *tertenant* is liable in the first instance.] In *Hales v. Freeman*, Dallas, C. J., after referring to the act relating to legacies out of personal property (36 Geo. 3, c. 52,) says, that the 45th Geo. 3, c. 28, puts real estate on the same footing as personal property, and that it is clearly compulsory on an executor to pay the duty, as the statute holds both executor and legatee liable. In *Attorney-General v. Jackson*, the parties who held the land subject to the annuity were held liable in the first instance to pay this

(a) And see *Wilkinson, in re*,  
Exch. E. T. 1834.

(b) 1 Brod. & Bingh. 391 ; 4 B.  
Moore, 21.

notice of the fiat. There is no evidence of the bankruptcy. You have received no damage unless the property has been changed.

**ROBERT J.**—It seems to me, that the direction was, perfectly right. If there was nothing in this case, but that the sheriff ought to have sold on the 6th or 7th of May, and had not done so, and you have sustained no substantial damage, you can only recover nominal damages for the breach of duty. Had you shewn that if the sheriff had sold on the 6th or 7th, the act of bankruptcy would not then have been completed, but that afterwards, before the sale, an act of bankruptcy had been committed, then you would have proved a change of the property and a real loss, for which you might have recovered. You ought to have shewn an act of bankruptcy committed between the time when the sale ought to have been held, and the time when it did actually take place.

**PATTERSON, J.**—I am of the same opinion. It lay upon the plaintiff to shew, by evidence of an intermediate act of bankruptcy, that he had sustained actual damage. He should have shewn that the property had actually passed into other hands through the neglect of the sheriff.

**TILKINSON, J.**—Upon the subject of the damages, I said that the trial as my lord and my brothers have said to-day. I have refused to nonsuit, because I thought the sheriff had clearly neglected his duty.

**Rule refused.**

**APPEAL.**—I have said that the trial as my lord and my brothers have said to-day. I have refused to nonsuit, because I thought the sheriff had clearly neglected his duty.



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of the real estate; and this raises the question whether it was the intention of the legislature to charge the real estate. The question arises upon the 55th Geo. 3, chap. 184, schedule 9, in which the words are, "every legacy specific or pecuniary, or of any other description," given either out of the personal or movable estate, or out of or charged upon the real estate, or out of any moneys to arise by the sale, mortgage, or other disposition of the real estate, or any part thereof; and in which it is afterwards declared that all gifts of annuities, or by way of annuity, or any other partial benefit or interest out of any such estate or effects as aforesaid, shall be deemed legacies within the intent and meaning of this schedule. This part of the act is copied very closely from 45 Geo. 3, c. 28, sect. 4. This is not a legacy, specific or pecuniary, charged upon the real estate; nor is it an annuity so charged, but it is a rent charge. The distinction between a rent charge and an annuity is well known. A rent charge is described by *Littleton* (a) as a yearly rent to be issuing out of land, with a clause of distress; and rent seek or annuity is described as such a rent without clause of distress; and in 144, b. Lord *Coke* describes an annuity as "a yearly payment of a certain sum of money granted to another, in fee for life or years, charging the person of the grantor only." That which is devised in the present case is not an annuity or any thing arising out of the land; it is a portion of the land itself. Strictly speaking, an annuity cannot be given by will. [*Denman*, C. J. You cannot distinguish this case from that of the *Attorney Gen. v. Jackson, Parke, J.* Surely after that decision it would be difficult to persuade the Court that this is not subject to the legacy duty.]

Second point. The second question then is, whether the annuity is to be paid to the annuitant free from the legacy duty, in consequence of the expression in the will, "clear of all taxes and deductions whatsoever." If the legacy duty is not to be considered as a tax, it is difficult to conceive what de-

(a) Sec. 218.

ductions, beyond that of the land tax, there could be made which would satisfy the "expression clear of all taxes and deductions whatsoever." The annuity certainly ought to be clear of the legacy duty. *Barksdale v. Gilliatt* (a), *Duwkins v. Tatham* (b), *Smith v. Anderson* (c).

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1. The next question is, who is to pay the duty of the legacy, which is to be free. Is the plaintiff bound to pay it; and if so, can he resort to the legatee? The 5th sect. of 45 *Geo. 3*, c. 68, charges the legacy duty upon persons empowered or required to pay or satisfy any legacy charged on real estate, who is to retain out of the legacy. Here, the tertenant is not the person paying or satisfying, and having the power to retain. The legatee may distrain. It is a charge upon the land. It is said that it is quite clear that the testator cannot have meant to charge the owner of the land with the legacy duty; but there is nothing unreasonable in supposing that the testator meant that the devisee of the land should take it charged with the duty, (which the law requires him to pay in the first instance,) as well as with the annuity. But assuming that the tenant is entitled to be reimbursed, why is he to resort to the legatee? The legatee, it is said, may file a bill in equity against the executor to refund; but there is no necessity for such a circuitous course; if the annuitant is not the party liable, the tertenant may at once file a bill in equity against the executor to repay him out of the residue, that being the fund out of which, he says, it is payable.

Third point.

*Kelly*, in reply. Reference has been made to a number of cases, beginning at *Barksdale v. Gilliatt*, to shew that where an annuity is given free of all taxes and deductions, the legatee is not liable to pay the legacy duty out of his annuity. *Hales v. Freeman* is an authority for the plaintiff, shewing that whether the legatee is chargeable or not, yet as between the tertenant and the legatee, the legatee is bound to repay the tertenant. The same line of argument might have been then used as has been brought

(a) 1 Swanston, 562.

(c) 4 Russell, 352.

(b) 2 Simons, 492.

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forward to-day; but *Hales v. Freeman* was decided upon another point; that case is quite as strong as any other in which the question has not been expressly raised. It would appear that all the cases cited were cases between executors and legatees. It seems very improbable that the testator intended that the legacy duty should be charged upon the land. By the acts of parliament, the duty is chargeable on the persons paying or satisfying the legacy, and moreover, the legatee is expressly made a debtor to the crown. Suppose the land is insufficient to pay the legacy duty, in addition to the annuity, is it to be contended that the heir is to pay it out of his own pocket? If not, who is to pay it? The crown is clearly entitled. [*Littledale, J.* When a legacy is given out of the personal estate, if there is not more than enough, the executor is not personally bound to pay, neither shall the tertenant.] The Court cannot inquire whether there is a sufficient residue. [*Littledale, J.* Suppose a legacy of 1000*l.* to a stranger, and there are assets only to that amount, the executor would not pay the legacy duty. He would pay the legatee 900*l.* and the legatee would give a receipt for the whole amount. This is the ordinary course, —to pay the legacy minus the duty. When the executors delay paying the duty they are liable to the crown.] In the case of a legacy free from all taxes and deductions, the legacy duty is payable out of the residue. If the executor pay it in the first instance, he may in the meantime recover against the legatee the very amount which is to be ultimately paid out of the residue. [*Parke, J.* You contend that it is the same as if the annuity was charged upon the land, and the legacy duty payable by the executor.] Yes; but it is not necessary to go so far. Even supposing the tenant to be liable if the land be sufficient, the Court cannot inquire into this. The legatee is in the first instance liable, and his claim upon the tertenant, if the land proves sufficient, is an equitable claim. If an executor had paid a legacy in full, and had afterwards paid the duty to the crown, he might sustain an action, and the legatee could not set off his equitable

claim upon the residue. This right to have the duty repaid, whether by the tenant or by the executor, is purely an equitable right, and cannot be considered in a Court of Law. Here, the will gives the son a power to appoint to the widow no larger a sum than 500*l.* clear of all taxes and deductions; now if the land is to be charged with the legacy duty, it will be a power to charge the land with 500*l.* a year and an additional sum of 500*l.* or 600*l.*

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*Cur. adv. vult.*

In the course of Trinity term the judgment of the Court was delivered by

DENMAN, C. J., who, after stating the facts, proceeded thus:—The first objection taken to the plaintiff was, that such an annuity so issuing out of land was not subject to the payment of the legacy duty. The contrary was, however, decided in the case of *Attorney General v. Jackson* (a) after full argument and time taken to consider. The authority of that decision was questioned in the argument before us, but it appears to us to be correct. It follows from the 36 *Geo.* 3, cap. 52, sec. 6, and 45 *Geo.* 3, cap. 28, sec. 5, that the plaintiff, who was in possession of the lands, was compellable to pay the legacy duty upon this annuity; and from the case of *Hales v. Freeman* (b), that he might recover the amount so paid against the annuitant in this form of action, if the annuitant were chargeable with this duty.

First point.

But a second point was then made,—that this annuity was devised clear of *all taxes and deductions*, and that the annuitant was therefore entitled to receive it without any deduction of the legacy duty. It is a very probable conjecture that the testator had not the legacy duty in his contemplation at all, and that he may not even have known that the annuity was by law liable to the payment of it. But

Second point.

(a) 2 *Crompt. & Jerv.* 101. (b) 2 *Brod. & Bingh.* 391; 4 *B. Moore*, 21.

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we must understand the words of the will in their plain and ordinary sense, unless such a construction would be at variance with the intention of the testator to be collected from the context. The will provides, that the annuity is to be paid "clear of all taxes and deductions whatsoever." That is, that the net sum of 500*l.* is annually to come into the annuitant's hands; and this cannot be unless the legacy duty be deducted. No other part of the will leads us to a different construction. This decision is in conformity with those cited in the argument, *Barksdale v. Gilliatt* (a), *Dawkins v. Tatham* (b), *Smith v. Anderson* (c), in none of which, however, were the legacies directed to be paid clear of taxes, and in that respect they are not so strong as the present case. The legacy duty is clearly a "tax," and unless it be deducted the annuity will not be paid *clear of taxes*. If the testator had intended to exempt it from *the proportion of the taxes affecting the land*, as the land tax or other future taxes of the like nature, he ought to have used some qualifying expression. As he has not done so, we must take his meaning to have been, that no tax of *any* description should reduce the amount to be paid to the legatee.

Third point.

By whom then is the duty to be paid? There is no charge upon any other fund than the land. The land is devised to the use that the legatee shall take *from and out of the premises* an annuity, to be paid clear of all taxes and deductions. The burthen of paying the annuity clear of all taxes and deductions, is thrown upon the land, that is, the land is subject both to the annuity and the tax; and it is the same thing as if the amount of the tax were directly charged upon the land; consequently the plaintiff took the land subject to that charge, and when he paid the duty he released the land from it, leaving it still liable to the net annuity. He cannot therefore be considered as having paid a sum of money to which the annuitant was liable, and therefore cannot be permitted to recover it from her. It is

(a) 1 Swanst. 562.

(c) 4 Russ. 352.

(b) 2 Sim. 492.

no hardship on the plaintiff, for if the value of the land had not been adequate to the payment of both the tax and the annuity, he might have renounced the devise. In *Hales v. Freeman* (a), the question as to the meaning of the word *deductio* used in the will, by which the annuity was granted, was never raised, and therefore it is no authority in this respect.

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Judgment for the defendant.

(a) 1 Brod. & Bingh. 391; 4 B. Moore, 21.

THE KING, on the Prosecution of THOMAS WALTERS, v. HENRY Duke of BEAUFORT, Lord,—THOMAS MANNERS, Esq. Steward,—and WILLIAM GRIFFITHS, Portreeve,—of the Borough and Manor of Loughor, in the County of Glamorgan.

IN Michaelmas term, 1 Will. 4, (1830,) a writ of mandamus issued to the defendants, requiring them, or one of them, to swear in and admit *Thomas Walters* a burgess of the borough. The writ surmised that the borough and manor of Loughor is an ancient borough and manor, and that by the immemorial usage and custom used in the borough, the jurors of the court-leet holden for the said borough and manor have had and still ought to have the privilege and authority of presenting persons to be admitted burgesses of the borough, and such persons have been used and of right ought to be sworn in by the steward and portreeve of the borough or manor, or one of them, and admitted burgesses thereof; that on 2d May, 1828, *Walters* was, by the jury of the court-leet holden for the borough and manor, presented as a fit person to be admitted a burgess, and therefore, according to the custom, had a right to be sworn and admitted a burgess of the borough; that he had demanded of the steward and portreeve to be sworn and admitted in pursuance of such presentment: yet, the

A custom in a borough for the leet jury of the borough, being also the leet jury of a manor, to elect the members of the corporation in whom the government of the borough is vested, is a reasonable and legal custom; although the manor and borough are not shewn to be co-extensive.

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steward and portreeve refused to swear him in and admit him as a burgess.

In Hilary term, 1 Will. 4, the lord and steward returned that the jurors of the court-leet had not by immemorial usage, nor ought to have the privilege of presenting persons to be admitted burgesses of the borough, except as thereafter mentioned; and that no person so presented ought to be sworn in and admitted a burgess, except as thereafter mentioned: that by immemorial usage and custom used in the borough, all persons admitted or claiming to be admitted burgesses of the borough, have been and ought to be presented by the said jurors, previously to their being admitted and sworn as burgesses of &c., but that by and according to the immemorial usage of the borough no persons by the jurors presented to be such burgess, have been or ought to be, as of right, sworn and admitted burgesses of the borough, except persons being sons of burgesses of the borough, born after their fathers have been sworn in burgesses of the borough,—persons married to the daughters of burgesses, born after their fathers have been sworn in burgesses of the borough,—and persons having served seven years' apprenticeship to burgesses of the borough, residing within the borough; which persons ought to be duly presented by the jurors to be admitted burgesses. The return then stated, that *Walters* did not come within either of these descriptions, nor was entitled as of right to be admitted a burgess on any presentment of the jurors, nor was he duly presented by the jurors to be of right thereupon admitted.

The portreeve returned, that he was willing to swear and admit, but that by the custom parties must be sworn in by the steward and portreeve jointly, and not by either of them separately; and that the steward had refused to concur with him in admitting or swearing in *Walters*.

*Walters*, in Easter term, 1 Will. 4, traversed the return of the lord and steward.

The issues joined on the traverses came on for trial before

*Aldersda, J.*, at the Glamorganshire summer assizes, 1832, when a verdict was found for the crown. In the following Michaelmas term *Whitcombe* obtained a rule nisi, in arrest of judgment, upon the ground that the custom stated in the record was bad, inasmuch as the effect of it was to constitute the leet jury of the borough, a manor of Loughor, electors of the freemen of that borough, which jury may probably consist of persons, none of whom are corporators, nor even inhabitants within that borough.

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*J. Evans* and *E. V. Williams* now (a) shewed cause. It cannot be collected from the pleadings that the manor and borough are not co-extensive, or that the jury of the court-leet are not sufficiently interested in the borough to qualify them to make presentments of burgesses. In *Rex v. Joliffe* (b), *Rex v. Mein* (c), and *Rex v. Rowland* (d), similar customs were stated, and no objection was taken to their validity. In *Rex v. The Mayor of West Looe* (e) there was no connection between the borough and the manor. It must be presumed that the persons who composed the court-leet were members of the corporation.

*Ludlow, Serjt.*, and *Whitcombe*, contra. The question is, whether the record contains a sufficient statement of a valid custom. [*Littledale, J.* I do not see what you have to do with the custom. It is not material whether the leet jury have a right to present, but whether the steward is bound to admit persons presented.] The question undoubtedly is, whether the steward is bound to act upon the presentment. In the cases cited, customs are set out similar to that alleged here, but not identical with it. But in none of them was the validity or invalidity of the custom a question before the Court. In *Rex v. Joliffe* the jury were alleged to be serving *for and in* the borough. Here, it does not

(a) *Trinity Term*, 1833.

(d) 3 Barn. & Alder. 130.

(b) 3 Dowl. & Ryl. 240; 2 Barn. & Cressw. 54.

(c) 5 Dowl. & Ryl. 590; 3 Barn. & Cressw. 677.

(e) 3 T. R. 596.



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24th April, 1833, indorsed, to levy 1000*l*. The sheriff seized accordingly soon after the receipt of the writ, and advertised a sale for the 6th, 7th, and 8th of May. The sale however did not take place until the 27th of May, (although the sheriff was pressed to sell early in the month,) the writ being returnable on the 30th of May. The sheriff returned that he had sold, and had paid rent and taxes, and that the remainder of the proceeds he had in his hands, but that he had received notice of a fiat against *Wilkes*, dated 16th of May.

The plaintiff claimed from the sheriff the whole amount indorsed upon the fi. fa., but no evidence being given of the bankruptcy, the counsel for the defendant applied for a nonsuit, on the ground that in the absence of such evidence there was no proof that the plaintiff had sustained damage by reason of the sheriff's delay in selling. The learned judge, however, being of opinion that the sheriff had neglected his duty, in that he did not sell earlier after the seizure, refused to nonsuit, but directed the jury to give a verdict for nominal damages for the mere neglect of duty.

In the following Michaelmas term

*Bulgin*, for the plaintiff, moved for a new trial, on the ground of misdirection. It was for the sheriff himself to discharge himself, by shewing that he was discharged by an act of bankruptcy which interfered with the plaintiff's execution. It clearly was his duty to sell sooner, and it was through his neglect that the sale did not take place until after the fiat, which was founded upon an act of bankruptcy committed by lying in prison. [*Denman*, C. J. You must prove a bankruptcy to sustain your case, because unless there has been an intermediate change of property, you have sustained no damage. *Parke*, J. We do not know that the fiat was founded on an act of bankruptcy; and if there was no act of bankruptcy, you have received no damage.]

DENMAN, C. J.—The sheriff only says, I have received

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duty, and it was considered that they might deduct the duty out of the annuity. If he may deduct the amount out of the annuity, he may bring an action to recover it, if he has paid. 45 Geo. 3, c. 28, sect. 5, is the clause, under which the crown proceeds in the first instance against the tertenant. It can hardly be doubted that the tertenant may in this case recover against the legatee, unless the will charges the tertenant not only with the legacy, but also with the legacy duty. This, it is apprehended, is quite contrary to the intention of the testator. The tertenant will not be charged with the duty, unless the language of the will is express to charge him. It has been repeatedly held in Courts of Equity, that a legacy free of duty is a legacy of the amount specified plus the amount of the legacy duty. It seems clear that the testator meant to charge the land with 500*l.* at the utmost. The extra legacy, therefore, can only be charged upon the residue of the personal property; if there be no residue the legatee himself must pay. A power is given to the tertenant to deduct the duty from the annuity, in case the duty shall have been paid by him.

*Thesiger*, contra. Upon the first point it would be idle to contend that this case differs from that of *Attorney General v. Jackson*. The object of submitting the question to the Court is, that the legacy may be brought under review. If this were an annuity, it would undoubtedly be liable, whether chargeable upon the personal estate or not; but it is a rent charge. The devise is upon trust to convey to the use of *Thomas Frisby*, the younger, for life, remainder to the use of the trustees to preserve contingent remainders during the life of *Thomas Frisby*, the younger, and after his death, to the use that *Mary Ann Frisby* shall take from and out of the said premises such annuity or yearly rent charge, not exceeding 500*l.* for her life, as *Thomas Frisby*, the younger, shall by will appoint. The rent charge is a use executed as soon as *T. Frisby*, the younger, appoints, and not a gift to devisees upon trust to pay it. It is, in fact, a devise to *Mrs. Frisby*, of a portion

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herself and husband, "relatives, &c." upon certain trusts, &c. in the power of the said John Robins, to sell, lease, or otherwise dispose of the same, and the words above printed in Italics were struck through with a pen, and in the margin was written in pencil, "as the testator's hand-writing." On February 14, 1825, at 10 o'clock, J. R. at the house of Brompton Tenebris, and gave my daughter Frances Anne Utterton, of the house in Portugal Street, Lincoln's Inn Fields, published of Lady B. in lieu of the house of Brompton Tenebris. It is conveyed to my son Joseph, but my desire and will, that it should be assigned to my daughter in trust as the other property. John Robins, 6 August, 1825.

After various other devises the testator devised the real, residue, and remainder of his real and personal estate, unto the said C. W. C., R. W., and J. G. B., their heirs, executors &c., as to one-fourth part thereof, to such uses as were thereinbefore declared of and concerning the second moiety of the premises in Regent Street and King Street, of which the first trust was declared for the use of *Mary Reid*, or as near thereto as the circumstances of the case would allow; and as to one other fourth part thereof to such uses as were thereinbefore declared concerning the said freehold and leasehold premises in Tichborne Street, Paddington Street, and Weymouth Street, of which the first trust was declared to be for the benefit of *Brummall*. And as to one other fourth part, to such uses as were thereinbefore declared concerning the said freehold and leasehold premises in Northumberland Street, Harley Street, and Brompton, and of which the first trust was declared for the use of *Frances Anne Sturton*; and as to the remaining fourth part, that is, to such uses as were thereinbefore declared of the first moiety of the premises in Regent Street and King Street, and of which the first trust was thereinbefore declared for the benefit of *Joseph Robins* for life, or as near thereto as the circumstances would allow.

6th May, 1825. The testator made a bequest to his will duly executed, and thereby, after reciting that he had devised

all the residue of his real estate to *C. W. C.*, *R. W.*, and *J. G. B.*, their heirs &c., upon certain trusts therein mentioned, and that, since the execution of his will he had purchased other estates, he devised to the same trustees and their heirs all the messuages and lands which he had purchased since the execution of his will, to hold to their use upon the several trusts in and by his said will declared concerning his real estate thereby devised to them as aforesaid.

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The testator afterwards wrote the following memoranda of a testamentary nature, which, however, were not attested by any witness:—"29th August, 1825. Memorandum for my executors and trustees. Whereas I purchased a freehold house of *Lady B.* in Portugal Street, Lincoln's Inn Fields, (from *Lightfoot* and *Robson*, and which is conveyed from *Lady B.* to my son *Joseph Robins*, the deeds in my possession). I give the said house, now in the occupation of *Mr. T.* as tenant at will, to my dear daughter *Frances Utterton*, and to go to her family as settled according to the other property in my will. Am certain my son *Joseph* will assign it according to my wish. *John Robins*, Regent Street. I had given my said daughter a house at the West end of Brompton Terrace, which I since sold, and the above is in lieu of the said house. *John Robins.*"

17th December, 1825. Testator made another codicil to his will, duly executed, in which he confirmed his will, and reciting that he had, since the date and execution of the said will, purchased divers real estates, gave them to the trustees for the trusts mentioned in the residuary devise in his will.

7th December, 1827. Testator made the following codicil, which was duly executed. "I do hereby republish my last will and testament in order that all estates purchased or agreed to be purchased by me since the date and publication thereof, may pass under the general devise of all my real estates therein comprised."

27th January, 1829. Testator made and published another codicil duly executed, by which he devised all sub-

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sequently acquired estates to the same uses and upon the same trusts, and subject to the same powers as the residue mentioned in his will.

16th April, 1829. Testator wrote and signed a certain memorandum, entitled, "A memorandum made 16th April, 1829, to be observed by my executors, of my desires and intentions after my decease and according to my will;" and therein, after enumerating the property specifically devised to the other branches of his family, he proceeds to annunciate the messuage specifically devised to Mrs. *Utterton* and her family, one of which he states to be "a freehold house situate in Portugal Street, Lincoln's Inn Fields, purchased of Lady B."

5th February, 1830. Testator made another codicil duly executed, by which he devised all subsequently acquired estates to the trustees of his will, upon the trusts contained in the residuary clause in his will.

17th May, 1831, testator died. The testator had issue three sons, namely, *John E. Robins*, who died 25 years ago, leaving one only child, *Elizabeth*, now Mrs. *Roby*, the said *Joseph Robins* and *James Robins*; and three daughters, namely, *Mary Reid*, *Sophia Brammall*, deceased, and *Frances Anne Utterton*. *Joseph Robins* has not any children, but there are several children of Mrs. *Reid*, Mrs. *Utterton*, and of the late Mrs. *Brammall*, who are parties to this suit.

In August, 1824, testator sold the house in Brompton Terrace, and between August, 1823, and 6th August, 1825, he purchased the house in Portugal Street, and by deeds dated 20th and 21st November, 1823, the same was conveyed to *Joseph Robins* and his heirs, to the use of testator and his heirs.

The question for the opinion of the Court is, whether the house in Portugal Street was devised by the will, or by any of the said codicils, and if so, to whom the same was so devised, and for what estate and interest,

*Russell*, for the plaintiff. The house in Portugal Street passed by the unattested testamentary papers. The codicils which were duly executed, republished the will of

the testator, and consequently the unattested testamentary papers which were a part of the will. In *Guest v. Wylasey and others* (a), the testator made a will and three codicils. The will was duly attested. The two first codicils were attested by two witnesses only, and referred to land in the will, and each appointed new executors. The third codicil was properly executed, and did nothing more than appoint an executor in the room of an executor named in the second codicil. The Court of Common Pleas held that the third codicil was a republication of the second codicil and of the will, but considered it doubtful whether it was a republication of the first codicil. The case was sent back to them to consider that question, and then it was held that the third codicil was a republication of the first. The publication of a codicil operates as a republication of the will, and being a republication of the will, it is also a publication of all documents forming part of it, and which would be admitted in probate as part of the will. In *Crobie v. Mac Doual* (b), *Arden, M. R.* says, "It is perfectly true that if a man ratifies and confirms his last will; he ratifies and confirms it with every codicil that has been added to it." The will and the codicils are evidence of the same disposing mind, and the one is a republication of the other; *Hulme v. Heygate* (c). It is immaterial that the codicils are written on separate pieces of paper. The principle which is to be extracted from all the cases, is thus stated in *Powell on Devises* (d), "A codicil, if executed according to the statute of frauds, will amount to a republication of a will of real estate; and this rule, it is to be observed, applies whether the codicil be or be not annexed

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First point:  
Codicils.

(a) 2 Bingh. 489; 19 B. Moore, 2. *Arndt v. Arndt*, 1 Serg. & Rawle, 256; *Witter v. Mott*, 2 Day's Rep. 7; *Reed v. Borland*, 14 Mass. Rep. 208; *Milledge v. Lamar*, 4 Dessaus. Chanc. Reports, 593; *Boudinot v. Bradford*, 2 Dallas, 268, and 2 Yeates, 170; *Lawson v. Morrison*, 2 Dallas, 286; (c) 1, Meriv. 285. (d) In vol. i. 610, ed. by Jarman.

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diction. Upon the authority of the case of *Riley v. Byrne* we think we may act. The rule therefore must be made absolute.

Rule absolute for payment of costs.

DOE, on the several demises of ANDREW PRITCHARD,  
FREDERICK SMITH and others, v. DODD.

A demise by A. to B. for the term of his natural life, may enure as a demise either for the life of A. or of B., according to circumstances.

*Seems*, that if the habendum be to B., his executors, administrators and assigns, a presumption is created in favour of a demise for the life of A.

Such presumption is confirmed by a covenant by A. with B. for quiet enjoyment during the life of A.

Such a covenant per se would amount to a demise.

Where a party to a conveyance is therein described as heir at law of J. P., a surviving devisee of the legal estate, such description is not evidence of the prior death of the co-devisees, or that such party is heir of J. P., even against another party who executed the conveyance.

Payment of rent is *prima facie* evidence of a tenancy from year to year.

*Secus*, where the existence of such a tenancy would imply that devisees in trust had conveyed away their estate, whilst a duty still remained to be performed by them, *semble*.

The presumption is completely rebutted by showing that the rent paid and reserved is of the same amount as the rent reserved in an unexpired lease, the premises being, at the time of such payment of rent, of much greater value than the rent so reserved and so paid.

Where leave is reserved to move to enter a nonsuit upon one point only, the Court, when it has the facts before them upon the judge's notes, will take the whole of these facts into its consideration, and will come to such a decision as these facts require.

**EJECTMENT** for houses in Middlesex. At the trial before *Denman, C. J.*, at Westminster, at the sittings after Hilary term, 1833, the following facts appeared :

1794. *Andrew Pritchard*, deceased, being seised in fee, devised the houses, inter alia, to A. and B., upon trust, to pay annuities to certain persons, some of whom are still alive, and to permit *John Pritchard* to have the rents and profits during his life, remainder to the first and other sons of J. P. in tail. The lessor of the plaintiff, *Andrew Pritchard*, is the first son of J. P.

1804. Upon the death of the testator, *John Pritchard* entered, and afterwards became a bankrupt.

24 May, 1816. By indenture, after reciting that *Adams*, in pursuance of an agreement for a lease made in 1807, had erected buildings on the land at great expense, *Kemp*

on the will is unattested, and is not referred to by any document annexed to the will; and it is stipulated that any of the witnesses to the will is to certify the memorandum in question. By the statute of frauds it is requisite that the witnesses should see the instrument to which it is to be authenticated by their attestation. [Denman, C.J. Suppose that by my will I devise this property left me by my father's will, would it be necessary that the witnesses should see the will of the father?] No. There no other instrument could be substituted. The defect here is, that the testamentary papers were neither seen nor attested by the witnesses. [Denman, C.J. Do you mean to contend that if a testator makes a will, and being unable to procure witnesses to attest it at the time, afterwards makes a memorandum referring to the unattested will, and naming the date of it, and has it properly attested without the witnesses seeing the will, such a will would not pass real estate?] It is submitted that such a will would not be valid. In *Habergham v. Vincent* (e), Wilson, J., thus expresses himself: "By the common law a man could not devise land. Then came the statute permitting him to do so by an instrument properly signed (b). Then, lest testators should be imposed upon, these guards were executed (*qu. extended*) by the statute of frauds; and that it insists that a will of land shall either be executed in the manner pointed out or be void." *Casson v. Dade* (c) shews it to be necessary that the witnesses should see the instrument they attest; *Broderick v. Broderick* (d),

*Broderick v. Broderick* (d), in reply. Cases have been cited to show that the witnesses must see the testamentary paper they attest. This is not denied. The proposition contended for is, that the conditions properly attested republish the will, and that the will is thereby rendered valid. [Denman, C.J. *See* *Broderick v. Broderick* (d), *supra*, p. 327. *See* *Broderick v. Broderick* (d), *supra*, p. 327.]

(b) By the statute of wills (32 H. 8, c. 1,) a writing was required,

(c) 1 Bro. C. C. 99.

(d) 1 P. Wms. 286.

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testamentary papers devising the property to Mrs. *Utterton* form a part of that will. There is no substantial difference between this case and *Quist v. Willasey*. The third codicil republished the first, although it did not refer to it. It was once held that there could be no republication of a will without re-execution; *Attorney General v. Downing* (a). But that doctrine has long been exploded, and it is now established that a codicil attested by three witnesses is a republication. Authorities are collected in *Powell on Devises* (b), which shew clearly that the annexation of a codicil is not requisite. It is not essential that the witnesses should see the paper which is republished. It is only necessary that they should see the instrument by which the other is republished. The only difficulty is that which was thrown out by the Court, namely, that there should be a reference in the republishing instrument to that which is republished. The will itself is altered in pencil, and there is a reference to the will. [*Parke, J.* Supposing that argument well founded, what do you say to the effect of the last codicil which devises all lands subsequently purchased?] Assuming the memoranda to be properly executed, there is an express devise of a particular house, which would not be revoked by the general devise; *Holdfast v. Pardoe*. [*Parke, J.* There the devise was of all the farms of the testatrix, in the occupation of B., a part of which was marsh, and this was held not to be included in a subsequent devise of all the testatrix's marsh land, the testatrix having a quantity of marsh land besides.] The intention of the testator was not to revoke any previous devise, but merely to prevent a partial intestacy.

On June 7th, 1833, the following certificate was sent:—

"We have heard this case argued by counsel, and are of opinion that the house in Portugal Street, in the pleadings mentioned, passed by the codicil of the 5th of February,

(a) *Ambl.* 550, 580. (b) *Vol. i. p. 612, Jarman's edition.*

1880, to the trustees, named in the will, their heirs, and assigns, to the uses and upon the trusts expressed in the will of and concerning the residue of the testator's real estates.

1823.  
UTWANTON  
v.  
ROBERTS.

T. DENMAN,  
J. LITLEDALE,  
J. PARRE,  
J. PATTERSON."

REX v. The JUSTICES of CHESHIRE.

A Rule nisi for a mandamus had been obtained, calling upon the defendants to shew cause why they should not be commanded to enter continuances and hear the appeal of one *Oxten*, against an order upon him made by two justices of Cheshire, upon a complaint in writing exhibited on the behalf of Sir T. S. M. Stanley by his bailiff, complaining that *Oxten*, who was tenant of Sir T. S. M. Stanley, had fraudulently conveyed away his goods, to prevent his landlord from distraining the same. The justices having heard the parties on 11th February, 1833, made and delivered an order under 11 Geo. 2, c. 19, sect. 4, *Oxten* refusing to pay to Sir T. S. M. Stanley, or his bailiff or agent, 72l. 5s., being double the value of the goods. The fifth section of the act gives a party who may think himself aggrieved by an order made under the preceding clause the right to appeal against it to the next general quarter sessions. *Oxten* gave notice of appeal against the order. This order it was found was informal, and upon the first day of the sessions to which the appeal (8th April) was made, an amended order was placed upon the files of the Court, and notice of the filing of such order was given to *Oxten* and his attorney on the same day. On the 10th April the appeal was duly entered. The appeal being called on subsequently in the same sessions, evidence was given, on the part of the tenant, of the delivery of the first order, and of the notice of appeal; and on

After notice of appeal against an informal order of two justices, for payment of double the value of goods fraudulently removed to prevent a distress, a formal order is drawn up and filed, of which notice is given to the appellant. The Court of Quarter Sessions is bound to try the appeal as an appeal against the original order.

1833.  
  
 The King  
 v.  
 The Justices  
 of Chester.

the part of the landlord, of the filing of the amended order, and of the notice of the filing of such order. (The Court refused to hear the appeal against the first order, which the respondent contended was a mere nullity, and confirmed the order filed on the first day of the term.) Against this rule nisi, in Trinity term, 1833, the defendant moved for a writ of *certiorari* to remove the proceedings into the King's Bench, and *Cottingham* shewed cause. In *Rex v. Barker* (a), the Court refused a criminal information against the magistrates for returning to a writ of *certiorari*, a conviction of a party in a more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the magistrates' clerk, the conviction returned being warranted by the facts. This shews that the Court of Quarter Sessions had authority to do as they have done in filing an amended order. The language of Lord Kenyon, C. J., in *Rex v. Barker*, is strictly applicable to the case before the Court. [Parke J. The sessions decided on the ground that they might consider the appeal as an appeal against the second order, whereas the application was to hear an appeal against the original order. It seems to me that as soon as the justices had put their hands and seals to the order, it might be acted upon and appealed against.] But if this first order be informal, or drawn up by mistake incorrectly, as in the case of *Rex v. Barker*, an amended order may be substituted for it; *Rex v. Allen* (b). This is the same in principle as a conviction. The magistrates could not do otherwise than as they did; they could only decide upon the order which they found upon the file of the Court, and that order was correct, and therefore properly confirmed. The original order, as it appears upon the face of the affidavits filed, in moving for this rule, is absurd upon the face of it, and the Court will not command the justices to entertain an appeal against it. [Denman, C. J. The absurdity of the order cannot give the

(a) 1 East, 186.

(b) Paley on Convictions, 37; 15 East, 335.

brought in tort. This shows that the Court will construe the expression to mean tort. [*Denman, C. J.*, The Court did not there say that the company would have proceeded improperly if they had brought assumpsit. *Taunton, J.* They only said that the company *might* upon the act bring tort.] If it had been intended to use the expression *action on the case* in its most general and comprehensive sense, the legislature would not have coupled it with an action of debt.

1833.  
CORBETT  
V.  
CARPMAEL.

DENMAN, C. J.—I infer from the act that “action on the case” means any form of action on the case that may arise.

#### Rule for entering a nonsuit refused (a).

the breach of a contract for which no remedy existed, or was supposed to exist, in the established actions of covenant or debt. This distinction became at last so marked, that the two forms of action on the case were not allowed to be comprised in the same writ. Still the name of “action on the case” continued to be applied to each class. But the late statute of 2 Will. 4, c. 39, (Uniformity of Process Act,) requiring, by sect. 1 & 4, serviceable process to be in the forms contained in the schedule to the act, in which schedule a

form is given of “an action on promises,” an action of assumpsit can no longer be described in the process as an action on the case; and such description would constitute a variance between the process and the declaration in assumpsit, subjecting the plaintiff to an application to set aside the declaration for irregularity.


(a) Several other points, not of any general importance, were raised, upon one of which only a rule nisi for a new trial was granted. That rule was, upon cause shown, discharged in T. T. 1834.

#### YARDREW v. BROOK.

**FOLLETT**, in the early part of Michaelmas term, obtained a rule calling upon the defendant to shew cause why he should not pay the plaintiff's attorney the sum of

Where, after notice of declaration in an action of slander, the defendant

signs a paper containing an apology, and a statement, that at his request the plaintiff has consented, on his paying the costs as between attorney and client, and making such apology, to stay the proceedings therein, and notice of trial is accordingly countermanded, the Court will require the defendant to pay such costs, and empower the plaintiff to sign judgment as for want of a plea, in case of non-payment thereof.

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 TURNER  
 v.  
 ROBINSON,  
 ROBINSON AND  
 SANFORD.

during that year. In January, 1831, the third defendant, *Sanford*, joined the firm of the *Robinsons*, and the plaintiff, therefore, became the servant of the three defendants. The only evidence of the amount of the wages was that of a witness who stated that the plaintiff had told him he was to have at the rate of 80*l.* a year. In the month of June, 1834, the plaintiff was dismissed from the defendants' service for misconduct, in advising and assisting an apprentice of the defendants' to quit defendants' service to go to America. For this seduction of their apprentice, it appeared in the course of the cause, the defendants had brought an action against the plaintiff, in which they had obtained a verdict for 40*s.* damages. The defendants now resisted this action for wages, on the ground that by his misconduct the plaintiff, (being a yearly servant, rightfully dismissed during the year for which he was hired,) had forfeited all right to wages; and for this *Spain v. Arnott* (a), and *Pagani v. Gandolffi* (b), were cited.

The Lord Chief Justice was of opinion that the contract of hiring was entire, and therefore he nonsuited the plaintiff, giving him leave to move to enter a verdict for 37*l.* (c) In the following Michaelmas term,

*Law* moved according to the leave reserved. No case goes so far as to shew that a master may have a double remedy against his servant for misconduct, as is here claimed, namely, by action for the misconduct, and by resisting his claim of compensation for his services actually rendered. Here, an action has been brought for the seduction of the apprentice, in which the master recovered nominal damages; and now they claim further damages in the shape of a forfeiture of wages. It is not clear in this case that the contract of hiring was entire. The only evidence of a yearly hiring was that of the witness who was called to

(a) 2 Stark. N. P. C. 256.

(c) 6 Carrington & Payne, 16.

(b) 2 Carrington & Payne, 370.

proves the amount of the wages contracted for, and from this witness it only appeared that the plaintiff was to have at the rate of 80*l.* a year.

**DENNAM, C. J.**—Nothing appears to repel the ordinary presumption that the servant is hired upon a contract for a year. Where there is an entire contract, and the conduct of the servant is such that the master cannot have the benefit of his services for the whole year, then the whole wages are forfeited.

**PARKER, J.**—The only question is, whether there is any evidence to rebut the presumption of the contract being for a year. It is quite clear that it is an entire contract, and if the servant so conducts himself that he is properly dismissed within the year, or refuses to perform the whole contract on his part, he cannot recover any portion of the wages, which are payable only for the entire year.

**LITTLEDALE, J., and TAUNTON, J., concurred.**

Rule refused.

**BALES v. WINGFIELD, Esq. Sheriff of Rutlandshire.**

**CASE** against the sheriff of Rutlandshire, for not selling goods seized under a *fi. fa.* At the trial before *Taunton, J.*, at the Leicestershire summer assizes, 1833, the following facts appeared:

A writ of *fi. fa.* upon a judgment on a warrant of attorney against *Wilkes*, issued to the sheriff of Rutlandshire on the

Case lies for a judgment creditor against a sheriff for not selling within a reasonable time after a seizure under a *fi. fa.*

But the plaintiff in such action can recover nominal damages only, unless actual injury be proved. Where, therefore, the sheriff delays selling for an unreasonable time, and before the sale, but after the time when he ought to have sold, receives notice of a fiat in bankruptcy against the execution debtor, and afterwards returns that he has the levy money in his hands, but that he has received such notice, it lies upon the plaintiff to prove the trading act of bankruptcy, &c. so as to shew that, by reason of the sheriff's delay, the right of property in the goods seized passed before the sale into other hands, and that the plaintiff's execution had been thereby frustrated.

1833.  
TURNER  
v.  
ROBINSON,  
ROBINSON and  
SANFORD.

1839.  
  
 BATES  
 v.  
 WINGFIELD.

20th April, 1839, indorsed, to levy 1000*l*. The sheriff seized accordingly soon after the receipt of the writ, and advertised a sale for the 6th, 7th, and 8th of May. The sale however did not take place until the 27th of May, (although the sheriff was pressed to sell early in the month,) the writ being returnable on the 30th of May. The sheriff returned that he had sold, and had paid rent and taxes, and that the remainder of the proceeds he had in his hands, but that he had received notice of a fiat against *Wilkes*, dated 10th of May.

The plaintiff claimed from the sheriff the whole amount indorsed upon the *fi. fa.*, but no evidence being given of the bankruptcy, the counsel for the defendant applied for a nonsuit, on the ground that in the absence of such evidence there was no proof that the plaintiff had sustained damage by reason of the sheriff's delay in selling. The learned judge, however, being of opinion that the sheriff had neglected his duty, in that he did not sell earlier after the seizure, refused to nonsuit, but directed the jury to give a verdict for nominal damages for the mere neglect of duty.

In the following Michaelmas term

*Balguy*, for the plaintiff, moved for a new trial, on the ground of misdirection. It was for the sheriff himself to discharge himself, by shewing that he was discharged by an act of bankruptcy which interfered with the plaintiff's execution. It clearly was his duty to sell sooner, and it was through his neglect that the sale did not take place until after the fiat, which was founded upon an act of bankruptcy committed by lying in prison. [*Denman*, C. J. You must prove a bankruptcy to sustain your case, because unless there has been an intermediate change of property, you have sustained no damage. *Parke*, J. We do not know that the fiat was founded on an act of bankruptcy; and if there was no act of bankruptcy, you have received no damage.]

DENMAN, C. J.—The sheriff only says, I have received

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&  
WINGFIELD

notice of the fact. There is no evidence of the bankruptcy. You have received no damage unless the property has been changed.

**ROBERTSON, J.**—It seems to me that the direction was perfectly right. If there was nothing in this case but that the sheriff ought to have sold on the 6th or 7th of May, and had not done so, and you have sustained no substantial damage, you can only recover nominal damages for the breach of duty. Had you shewn that if the sheriff had sold on the 6th or 7th, the act of bankruptcy would not then have been completed, but that afterwards, before the sale, an act of bankruptcy had been committed, then you would have proved a change of the property and a real loss, for which you might have recovered. You ought to have shewn an act of bankruptcy committed between the time when the sale ought to have been held, and the time when it did actually take place.

**PATTERSON, J.**—I am of the same opinion. It lay upon the plaintiff to shew, by evidence of an intermediate act of bankruptcy, that he had sustained actual damage. He should have shewn that the property had actually passed into other hands through the neglect of the sheriff.

**TUNNICLIFFE, J.**—Upon the subject of the damages, I said that the trial as my lord and my brothers have said to-day, I refused to nonsuit, because I thought the sheriff had clearly neglected his duty.

**Rule refused.**

The sheriff said I was also bound to say that



1833.

Where a private act gives the trustees of a river-navigation power to sue for arrears of tolls "by action of debt or on the case," *assumpsit* will lie.

*Corbett v. Carmichael*.

**ASSUMPSIT** for tonnage rates and duties, due to the Trustees of the River Weaver Navigation, brought in the name of one of the trustees. Plea: *non assumpsit*. At the trial before *Gaselee, J.*, at the Cheshire summer assizes, 1833, it appeared that the action was brought under 47 Geo. 3, c. lxxxii. s. 29, which authorizes the trustees to sue for and recover tonnage rates, &c. "*by action of debt or on the case*," in their names or in the name of any one or more of them, or in the name of their clerk or treasurer. It being objected that the trustees could not sue in *assumpsit*, the learned judge reserved the point; subject to which a verdict was found for the plaintiff. In the following term

*U. Corbett* moved to enter a nonsuit, pursuant to the leave given. The plaintiff was not entitled to bring *assumpsit*; for the act (which, being private, is to be construed strictly against the parties obtaining it) gives only an "*action of debt or on the case*,"—by which, it is submitted, the legislature meant to confine the remedy of the trustees to an action of debt or in *tort*. *Huddersfield Canal Company v. Buckley (a)* was an action on the case, in *tort*; brought to recover the amount of calls made by the company upon shares held by the defendant. It was objected, that the action, being for a mere breach of contract in not paying a sum of money, ought to have been in *assumpsit*; but the act of parliament in that case giving the company power to sue for calls only, as here "*by action of debt or on the case*" (*b*), the Court held that the action was well

(a) 7 T. R. 96.

(b) The writ of "*trespass on the case*" was originally introduced to meet those injuries to which the ordinary writs of *trespass* were not applicable, and was intended to be framed to meet the particular "*case*" of the complainant,

Afterwards even these anomalous cases were reduced into two classes, viz. writs of *trespass on the case*, simply (i. e. for mere torts for which no action lay by any of the former writs of *trespass*), and writs of *trespass on the case sur assumpsit*, in which the wrong consisted of

brought in tort. This shews that the Court will construe the expression to mean tort. [*Denman, C. J.*, The Court did not there say that the company would have proceeded improperly if they had brought assumpsit. *Taunton, J.* They only said that the company *might* upon the act bring tort.] If it had been intended to use the expression *action on the case* in its most general and comprehensive sense, the legislature would not have coupled it with an action of *debt*.

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v.  
CARPMAEL.

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*T* 65*l.* 7*s.* 11*d.*, together with the costs of this application, to be taxed by the Master, or why the plaintiff should not be at liberty to enter up judgment as for want of a plea, and the Master be at liberty to tax the plaintiff's costs under the judgment, as between attorney and client. Upon the affidavit filed in support of this motion, it appeared that an action of slander had been commenced by the plaintiff against the defendant, to which the defendant pleaded; and that the cause having proceeded to issue, notice of trial at the Devon spring assizes, 1832, was given; but that shortly before the assizes an agreement was come to between the parties, in pursuance of which an apology was signed by the defendant, and published in some of the provincial newspapers, in which he recited that he had circulated a report prejudicial to the plaintiff's character, and that the plaintiff had commenced an action against him for circulating such report, and that at his request *the plaintiff had consented, on his paying the costs of such action, as between attorney and client, and making an apology for his conduct, to stay the proceedings therein.* A countermand of the notice of trial was then given, but the defendant has refused to pay the costs of the cause, amounting to 65*l.* 7*s.* 11*d.*, according to the bill sent to him by the plaintiff's attorney. The affidavits in answer stated, that the defendant being advised that he had a good defence to the action, intended to try at the assizes for 1832; that he was requested, to settle the matter by paying the costs and signing a written apology, which he refused to do; that at a second meeting of the parties, he, upon being requested so to do, signed the written apology above mentioned, but he denied it to be true, as recited in the apology, that the proceedings had been stayed at his request, or that he had consented or agreed to pay the costs; and stated that no such conditions had been required of him at the second interview. The defendant admitted that he had refused to pay the costs when applied to, and stated that he had informed the plaintiff's attorney that he had never agreed to do so, and that he was ready to go to trial in the action.

*Thesiger*, in Michaelmas term, shewed cause. The Court will not interfere summarily to enforce the performance of this undertaking, for at the most it is only conditional. In *Fricker v. Eastman* (a) it was held, that a judge's order, "that upon payment of debt and costs by a certain day, all proceedings should be stayed," was conditional only on the defendant, and not peremptory. The plaintiff's remedy is to go down to trial, and it is sworn on the affidavits that the party is advised that he has a good defence to the action.

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The Court then called on

*Follett*. In a similar case, *Campbell* obtained a rule precisely in the same form. That was in the case of *Riley v. Byrne*, reported (b), but not directly upon that point. There, after notice of trial, in an action against *Byrne* for a libel, the cause was compromised, the defendant agreeing to apologise and pay the plaintiff's costs as between attorney and client. The apology was made and accepted, and in Hilary term, 1827, a rule of Court was made in the cause, ordering the defendant to pay the plaintiff 67*l.* 13*s.*, his costs of the action, and 7*l.* 15*s.*, the costs of applying for the rule.

The Court again called on

*Thesiger*. The paper was signed by mistake, as appears from the defendant's affidavit. [*Taunton, J.* The paper speaks as plain language as possible. The only question is, whether this is the proper remedy.] The Court have no authority to proceed in this case, particularly as the paper contains only the recital of a conditional undertaking, precisely similar in effect to that in *Fricker v. Eastman*.

Per CURIAM.—It appears to the Court that this imports an absolute agreement, although it contains words of condition.

(a) 11 East, 519.

(b) 2 Barn. & Adol. 770.

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dition. Upon the authority of the case of *Riley v. Byrne* we think we may act. The rule therefore must be made absolute.

Rule absolute for payment of costs.

DOE, on the several demises of ANDREW PRITCHARD,  
 FREDERICK SMITH and others, v. DODD.

A demise by A. to B. for the term of *his* natural life, may enure as a demise either for the life of A. or of B., according to circumstances.

*Semble*, that if the habendum be to B., his executors, administrators and assigns, a presumption is created in favour of a demise for the life of A.

Such presumption is confirmed by a covenant by A. with B. for quiet enjoyment during the life of A.

Such a covenant per se would amount to a demise.

Where a party to a conveyance is therein described as heir at law of J. P., a surviving devisee of the legal estate, such description is not evidence of the prior death of the co-devisees, or that such party is heir of J. P., even against another party who executed the conveyance.

Payment of rent is *prima facie* evidence of a tenancy from year to year.

*Secus*, where the existence of such a tenancy would imply that devisees in trust had conveyed away their estate, whilst a duty still remained to be performed by them, *semble*.

The presumption is completely rebutted by shewing that the rent paid and reserved is of the same amount as the rent reserved in an unexpired lease, the premises being, at the time of such payment of rent, of much greater value than the rent so reserved and so paid.

Where leave is reserved to move to enter a nonsuit upon one point only, the Court, when it has the facts before them upon the judge's notes, will take the whole of these facts into its consideration, and will come to such a decision as these facts require.

**EJECTMENT** for houses in Middlesex. At the trial before *Denman, C.J.*, at Westminster, at the sittings after Hilary term, 1833, the following facts appeared:

1794. *Andrew Pritchard*, deceased, being seized in fee, devised the houses, inter alia, to A. and B., upon trust, to pay annuities to certain persons, some of whom are still alive, and to permit *John Pritchard* to have the rents and profits during his life, remainder to the first and other sons of J. P. in tail. The lessor of the plaintiff, *Andrew Pritchard*, is the first son of J. P.

1804. Upon the death of the testator, *John Pritchard* entered, and afterwards became a bankrupt.

24 May, 1816. By indenture, after reciting that *Adams*, in pursuance of an agreement for a lease made in 1807, had erected buildings on the land at great expense, *Kemp*

and *Corrick*, assignees of *John Pritchard*, deceased, and *J. P.* demised and confirmed the premises to *Adams*, to hold "unto *Adams*, his heirs, executors, administrators and assigns, for and during the term of his natural life," yielding and paying to the assignees, their heirs and assigns, during the term, the yearly rent of 6*l.*, payable quarterly. Covenants by *Adams*, for himself, his executors, administrators and assigns, to pay the rent of 6*l.*, to keep the messuages in repair, and at the end of the term or sooner determination of the lease by the death of *John Pritchard* or otherwise, peaceably to yield up. Covenant, on the part of the assignees and *J. Pritchard*, for quiet enjoyment during the natural life of the said *John Pritchard*.

1833.

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Title of de-  
fendant.

*Adams*, having continued in possession for several years, assigned his interest to *Corrick*, and died in 1817.

January, 1832. *Corrick* assigned to the defendant.

25th March, 1825. The first commission of bankrupt against *John Pritchard* was superseded.

Title of *An-  
drew Pritch-  
ard*.

November, 1825. *John Pritchard* again became bankrupt, and a new commission issued, and *Want* and *Ellis* were appointed assignees.

May, 1829. These assignees agreed to sell the life estate of *John Pritchard* to his son *Andrew*, who was immediately to be let into possession. In furtherance of this agreement, *John P.*, as devisee for life, and his assignees, joined with *Andrew P.*, who had been let into possession, in suffering a recovery.

1812. The life interest of *John P.* was mortgaged to one *Fleetwood*, upon whose death one *John Pritchard* the elder, as a creditor, took out administration cum testamento annexo. By a deed of the same date, *Corrick* was appointed receiver, to keep down the incumbrances.

Title of *Frede-  
rick Smith*.

9th and 11th October, 1830. *Want* and *Ellis*, *John P.* the elder, administrator of *Fleetwood*, one *Oldham*, described as heir at law of *Oldham* the surviving devisee in trust under the will of *Andrew P.* deceased, *John Pritchard* and *Andrew Pritchard*, and *Corrick*, joined in a con-

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DOOP.

Further title  
of *Andrew*  
*Pritchard*.

veyance of the premises to the lessor of the plaintiff, *Frederick Smith*, as trustee for *Andrew P.* No proof was given of *Oldham*, deceased, being the surviving trustee under the will, or of *Oldham*, the grantor in this deed, being the heir at law of *Oldham*, deceased.

24th December, 1830, *Corrick*, who was then in possession, was served with a notice to quit, signed by *Andrew P.*, in which he is treated as tenant from year to year.

January, 1831. *Andrew P.* distrained upon *Corrick* for an arrear of the rent of 6*l.*, which was afterwards paid by *Corrick* under the distress. *Corrick* continued to pay the rent of 6*l.* a year down to 29th December, 1831, and after that the defendant paid 1*l.* 10*s.* for one quarter's rent due 25th December, 1831.

The other lessors of the plaintiffs claim as mortgagees of *Andrew P.* the son, their co-lessor.

The plaintiff, at the trial, endeavoured to shew a title in *Andrew P.* the son, under the will of 1794, and the assignment to him of the life estate of his father; but it appearing that the legal estate under the will was in the devisees in trust and their heirs during the life of *John Pritchard*, this deduction of title was abandoned.

The conveyances of 9th and 11th October, 1830, were then put in by the plaintiff's counsel to support the demise by *Frederick Smith*. To this it was objected, that the recital in the deed of release of the character in which *Oldham* granted was not of itself evidence of his being the heir at law of the surviving devisee. The Lord Chief Justice held this objection good, and that therefore the plaintiff had failed to prove a legal title under this conveyance. For the plaintiff it was then contended, that the payment of rent by the defendant to *Andrew Pritchard*, both voluntarily and under a distress, and that after a notice to quit had been given, was an attornment and evidence of a tenancy from year to year, and that the defendant was estopped therefore from denying the title of *Andrew Pritchard*. The defendant then gave evidence of the lease.

To *Adams*, and deduced the title from *Adams* to himself, as above; and shewed that the rent reserved was the same as the rent distrained for and paid, the premises being now of much greater value than the rent. The question then arose, whether the lease was for the life of *Adams*, who is dead, or of *John Pritchard*, who is still alive; and the learned Chief Justice being of opinion that the lease was for the life of *Adams* only, and that therefore the payment of rent after the expiration of the lease, and after notice to quit, was evidence of an attornment by the defendant, directed the jury to find for the plaintiffs, but gave the defendant leave to move for a nonsuit upon the question as to the construction of the lease. Verdict for the plaintiff.

In Easter term, 1833, *F. Pollock* obtained a rule nisi for a nonsuit accordingly; against which, in Michaelmas term, 1833,

Sir *J. Scarlett* shewed cause. In 1812, *John Pritchard* the younger granted all his life estate to *John Fleetwood*, under whom *Frederick Smith* claims; and the defendant claims under a lease by the same person and his assignees in 1816. The lease refers to an agreement of 1807, but there was no proof of such an agreement. The defendant, claiming under a lease from *J. P.*, is estopped from saying, as against the lessors of the plaintiff, that he had not the legal estate. Quâcunque viâ datâ the plaintiff's title is secure; for if *John P.* had a legal life estate, that was assigned to a person under whom one of the lessors of the plaintiff claims, by a deed prior to that on which the defendant's title rests; and if the legal estate was in the trustees, then the defendant can derive no better legal estate from *John P.* than the lessors of the plaintiff, and the case is left upon the payment of rent by *Corrick*, under whom the defendant claims to hold. The payment of rent may be taken to be an acknowledgment that there have been valid mesne assignments between the persons entitled originally under this will and the party to whom the rent is

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v.  
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paid. It is said that the plaintiff ought to have proved, by extrinsic evidence, that *Oldham*, who is described in the deed of 1830 as heir at law of the surviving trustee, did actually fill that character. This was not necessary, for *Corrick*, under whom the defendant claims, was a party to that deed. The defendant, however, claims under a tenant who has paid rent to *Andrew Pritchard*, the son, and therefore it is incumbent on him to shew that he has a better title than any of the lessors of the plaintiff.

*F. Pollock, contra.* The cause was tried and brought to a conclusion, one single point having been reserved for further consideration. Upon that point alone the leave was given to move, and upon that alone the rule was granted; and yet now the whole case has been gone into with a view of, in effect, gaining a new trial without payment of costs. This cannot be permitted. [*Denman, C. J.* Certainly it was considered that this one point only ought to be reserved; but if it appears to the Court, from the judge's notes, that this point was wrongly ruled, I do not see how the Court are to shut their eyes upon other points in the case.] The case was reduced to this, that the plaintiff could not recover unless the payment of rent was *estopped*. This payment was explained by its being shewn that it was under the deed of 1816 that the rent was paid. Then it was contended that this lease had expired. The question then is,—is this a lease for the life of *Adams* or of *John Pritchard*? The answer is to be collected, not from any particular expression, but from the whole deed. *John Pritchard* grants to *Adams* for the term of his natural life. This is certainly ambiguous, for the word "his" may refer either to *Pritchard* or to *Adams*. [*Parke, J.* The devise is to *Adams*, his executors, administrators and assigns. This seems to shew that the lease cannot be for the life of *Adams*.] The covenant for quiet enjoyment during the life of *John Pritchard* is perfectly clear to shew that the lease was for the life of *John P.* The rent paid upon the

distress is only at the rate of 6*l.* a year, which is the rent reserved to *Pritchard* and his representatives by the lease of 1816. This clearly shews that the payment of rent is no admission of the title of the parties to the possession of the estate during the life of *John P.* If the plaintiff rests his title upon the payment of rent, that being explained, the presumption of a yearly tenancy is rebutted, and therefore his title fails.

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DENMAN, C. J.—The payment of rent is clearly *prima facie* evidence of a tenancy from year to year, but it may be rebutted so as to shew that the payment was made under the reservation in a lease. The rule was certainly granted upon the point reserved at the trial, but still I do not see how it is possible for the Court to refuse to look at the whole law of the case, when it is brought before them. The payment of rent was sought to be explained by the deed of 1816; and if the payment is to be referred to that deed, it clearly puts an end to the presumption of a tenancy from year to year. The rent paid is precisely the rent reserved, and I think that as well as it is proved that the defendant treated the lessor of the plaintiff, *Andrew Pritchard*, as landlord, so well is it proved by the distress for rent, at the rate of 6*l.* a year, that *A. P.* has recognized the defendant as tenant under the lease of 1816. The distress evidently refers to that deed. This gave rise at the trial to the question whether the lease was for the life of *Adams* or of *Pritchard*. I therefore looked into the deed, and thought that though it might have been intended to be a lease for the life of *Pritchard*, it was in fact for the life of *Adams*. I gave full effect to the *granting clause*, which I certainly considered as demising for the life of *Adams*, but this construction does violence to other parts of the deed. I entirely agree with the argument that a covenant for the quiet enjoyment, during the life of *Pritchard*, was in itself a lease for his life. The true construction, I think, is, that it is for the life of *Pritchard*, who is still alive:

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PARSONS, J. I am of opinion, now the facts are fully before the Court, that Mrs. RITCHARD is entitled to make such rule absolute. The case turns entirely upon the last point, as to the construction of the lease of 1816. If the true construction be that it was for the life of John Pritchard, and not of Anne, then the plaintiff is not entitled to recover. The plaintiff begins his title with the will of Andrew P. The estates under that will are devised to be sworn persons, in trust, to pay annuities, and to permit and suffer John P. to receive the rents and profits for his life, and afterwards an estate tail is created. As John P. is still alive, the trustees have the legal estate, but his lessee, not entitled to the rents and profits. Then if Andrew P. the lessor, says that he has the legal estate of the heir of the surviving devisee, he must prove that fact by legal evidence. Independently of any title that may have been acquired by the payment of rent, the legal estate is not in any of the lessors. But it is said that by the payment of rent to Andrew P., the defendant acknowledged a yearly tenancy. That is only *prima facie* evidence, and may be rebutted. There may be some question whether the will alone would not be sufficient to rebut the presumption, inasmuch as the trustees had a duty to perform, and therefore could not part with the legal estate. It is however unnecessary to decide that point. The rent was clearly not for the premises at their present value, for they are worth much more than 6*l*. The rent reserved in the lease of 1816 being 6*l*, it is clear that the payment of rent is referable to that lease. This therefore is only an acknowledgment that Andrew P. is entitled to receive the rent reserved by that lease; that is, provided the lease continues in operation. Upon the whole, least, I think it is a demise for the life of Pritchard. I do not proceed upon the point as to the covenant for quiet enjoyment, though I perfectly agree that a covenant for quiet enjoyment will operate as a lease. We have first however to look at the operative part of the lease, and by this

we find that the two assignees and *John P.* devised to *Adams*, his executors, administrators and assigns. Not only his assigns (and to take) but also his executors and administrators, that is, after the death of *Adams*. The next antecedent to the words "lives and during the term of his natural life," certainly is *John Adams*, which would rather favour the supposition that it was for the life of *Adams*. Afterwards there is an agreement by *John Adams*, for himself, his executors, administrators and assigns, for the payment of the rent, and there is a covenant for quiet enjoyment, which is to be for the life of *Pritchard*. Therefore, taking it altogether, I think it is a lease for the life of *Pritchard*, and upon this view I think the defendant is entitled to make absolute his rule for a nonsuit.

TAYLOR, J.—I think the mere description of *Oldham*, as heir of the surviving trustee, is insufficient, without extrinsic evidence that the description is true. The rule is, that a recital shall not be evidence for the party making the recital, though it may be so against him. Upon the point, as to how far the payment is to be ascribed to the lease, if I look at the case as a juror, I should say the evidence was all on one side. It seems by the deed of 1816, that there had been an agreement in which *Adams* covenanted to make improvements, and that they had been made, and then the lease is granted at the rent of 6*l.*, in consideration of the improvements. Now the value would be much more than 6*l.*, and yet the rent distrained for now, in 1831, is the same as that received in 1816. The payment of rent is therefore, in my judgment, clearly referable to the lease. Then by the lease the assignees and *John Pritchard* grant to *Adams*, his executors &c., for the term of his natural life. The word "his" in a sentence is often ambiguous. Generally speaking, it will refer to the last antecedent, which would make the lease in many cases to be for the life of the lessee; but there are many cases in which it has granted to *B.* for the term of his natural life, in which the lease has

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been held to be a demise for the life of the lessor (a). Such a lease may as well be for the life of the lessee as of the lessor, and we may receive explanation from other parts of the deed. There is here a covenant for payment of rent entered into by Adams, for himself, his executors &c., and also a covenant for quiet enjoyment during the life of *John Pritchard*, which are strong to shew that the lease was intended to be for the term of the lessor's life. It is law as old as the year books, that a licence to enter and occupy land amounts to a lease. This covenant therefore is very

(a) "A tenant in fee simple makes a lease of lands to B., to have and to hold to B. for term of life, without mentioning for whose life it shall be, it shall be deemed for the term of the life of the lessee, for it shall be taken most strongly against the lessor; and, as hath been said, an estate for a man's own life is higher than for the life of another. But if tenant in tail make such a lease without expressing for whose life, this shall be taken but for the life of the lessor, for two reasons:

"First, when the construction of any act is left to the law, the law, which abhorreth injury and wrong, will never so construe it as it shall work a wrong; and in this case, if by construction it should be for the life of the lessee, then should the estate tail be discontinued, and a new reversion gained by wrong; but if it be construed for the life of the tenant in tail, then no wrong is wrought. And it is a general rule, that whenever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against

law, the intendment that standeth with law shall be taken.

"Secondly, the law more respecteth a lesser estate by right than a larger estate by wrong; as if tenant for life in remainder discontinue tenant for life, now he hath a fee simple; but if tenant for life die, now is his wrongful estate in fee by judgment in law changed to a rightful estate for life." *Co. Litt.* 42 b.

So, if tenant for life demise with livery of seisin, without limiting the estate of the lessee, the demise shall enure for the life of the lessor, though he expressly reserve to himself a reversion after the death of the lessee. Accordingly it was held, that such a lessor could not be received to defend his right to the land upon the default of the lessee, all the estate of the lessor having passed by the demise, notwithstanding the attempted reservation; *William de Maundeville's* case, H. 8 E. 3; fo. 3, pl. 8.

Here, *John Pritchard* had only an estate for life; and therefore to have construed the lease as a demise for the life of Adams, the lessor, would have been to give it a wrongful operation.

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strong to explain the payment of the rent. There must be a nonsuit. *PATTESON, J.*—I am entirely of the same opinion, upon the point reserved as to the construction of this deed. I think the lease was for the life of *Pritchard*. The words of the demise are ambiguous. The covenant for quiet enjoyment I think alone sufficient to create a lease for the life of *Pritchard*. But there is another way of looking at it, that is, for the purpose of explaining the former part of the deed, taking all the parts together. Then there are words of demise to "*Adams, his executors*" &c., which shew that the demise could not well be for the life of *Adams*. The rule for a nonsuit ought to be made absolute, unless it appears to the Court, upon the facts before them, that the lessor of the plaintiff is still entitled to recover. We cannot shut our eyes to the real state of the case, when the whole is fairly before us. I confess I was once or twice inclined to think that the lessor was entitled, but now I am quite satisfied that he is not. If he is, it must be on one of two grounds—either on the ground of the payment of rent, or that the legal estate is in *Fredrick Smith*. Upon the first ground, *prima facie*, the payment of rent is sufficient, but, looking at the whole of the circumstances, I think there is no doubt that the rent was at all events paid under the lease, whether distrained for or not. It cannot operate as an estoppel, for an estoppel must be mutual. The very circumstances of the premises being of much greater value in 1830, and of the rent of 6*l.* being reserved in the lease, are clear to shew that it was distrained for under the lease. How otherwise could the sum of 6*l.* have entered the head of either party? Then as to the other point, there is no evidence that *Oldham* is the heir at law of the surviving trustee. The mortgage to *Fleetwood* was in fact several years subsequent to the lease to the defendant, and therefore cannot affect his older title. The other lessor of the plaintiff, *Andrew Pritchard*, is claiming

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under a conveyance from John Pritchard, also of subsequent date to that of the defendant. Upon the whole I think there is no distinct proof that any of the lessors have title by having the legal estate vested in them, nor by the payment of rent, for that is clearly paid and received with reference to the lease.

Rule absolute (a).

(a) And see 2 Man. & Ry. 363 (4).

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DOE d. LANGDON v. LANGDON.

A second ejectment will be stayed until the payment of costs of a former ejectment on the same title, when in the first ejectment the plea has been filed, and the draft consent rule drawn up but not entered into.

A Rule had been obtained in these actions, calling on the lessor of the plaintiff to shew cause why the proceedings in the case of *Doe v. Langdon* should not be stayed until the costs of the other ejectment, *Doe v. Roe*, were paid. In *Doe v. Roe*, which was a prior ejectment for recovery of possession of the same premises by the same lessor on the same title, the parties had proceeded in it as far as the filing the plea and preparing the draft of the consent rule, but the consent rule had not been entered into.

*Barstow*, in Michaelmas term, shewed cause. The rule of practice is, that the proceedings in a second ejectment are stayed until payment of costs of the first, where the first has had a legal termination. Here, the former suit is not pending. There must have been some variation of practice on the part of the lessor to stay the proceedings where there has not been even a trial in the former action. Here, no material expense can have been incurred, for the former action has not proceeded as far as the consent rule. The defendant should have taken some proceedings which he might do, although the consent rule had not been drawn up. He might have carried that action on to a non-pros. The present application is therefore premature.

*Gooding*, contra. The conduct of the lessor, of the plaintiff, in forcing the tenant to appear, and yet not entering into the consent rule, is sufficiently vexatious for the interference of the Court. Until that rule is entered into, the defendant has no means of recovering costs from him; he incurs no responsibility; and therefore he, by abandoning that former action, in effect practices a fraud on the Court. This principle was decided and acted upon in *Smith v. Barnardiston* (a). There the lessor, having brought two ejectments, in neither of which he had entered into the consent rule, brought a third, and the Court stayed the proceedings. [Barstow. That was the case of a third ejectment.]

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PER CURIAM.—The principle of that case seems to be in point, and therefore the rule must be made absolute.

Rule absolute.

(a) 2 W. Blackst. 904.

#### ENGLEHEART v. EYRE and EDWARDS.

**DEBT** on recognizance of bail. The declaration stated that the defendants had become bail or pledges for *A. B.*, and consented that if *A. B.* should be convicted in an action then depending against him at the suit of the plaintiff, and should not pay the damages adjudged, or tender himself, the same should be made of their lands and chattels, and levied to the use of the plaintiff, prout patet per recordum; and that although the plaintiff afterwards, that is to say, in *Hilary term*, 3 Will. 4, in the *K. B.* recovered against *A. B.* 78*l.*, whereof he was constituted bail, and the record should be so framed as to show that the verdict preceded the judgment.

A certificate for execution during vacation, under 1 W. 4, c. 7, s. 2, need not be noticed in a declaration on a judgment signed in vacation.

In a declaration upon such a judgment, the judgment should be stated to be of the first day of the following term, the record should be so framed as to show that the verdict preceded the judgment.

Where a judgment is obtained in vacation, the distress being of the first day of the following term, the record should be so framed as to show that the verdict preceded the judgment.



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victed, prout patet per recordum; yet A. B. had not paid the damages or rendered himself per quod actio accrevit. The defendants pleaded nul tiel record, both as to the recognizance and as to the judgment against the principal. To each plea the plaintiff replied, that there were records of the recognizance and recovery of the terms of Easter and Trinity terms, 2 Will. 4, respectively, stating the numbers of the respective rolls, and prayed that the same might be inspected by the Court. In Easter term the recognizance roll and the judgment roll were produced in Court, and it appeared in the latter that the distringas was returnable on the 15th April (i. e. the first day of Easter term), and in the postea it was stated that the action was tried on the 5th February, when the plaintiff obtained a verdict; that *Patteson, J.*, before whom the cause was tried, certified, according to the statute in such case made and provided (a) for execution on 5th March; and that judgment was therefore signed on the 15th March.

The Court, considering that the declaration on the recognizance, which, in conformity with the old practice as to judgments signed in vacation, stated the judgment to

(a) 1 Will. 4, c. 7, s. 2, by which it is enacted, "that in all actions brought in either of the said Courts, (his majesty's courts of law at Westminster,) it shall be lawful for the judge, before whom any issue joined in such action shall be tried, in case the plaintiff therein shall become nonsuit, or a verdict shall be given for the plaintiff, to certify, under his hand, on the back of the record, at any time before the end of the sittings or assizes, that in his opinion execution ought to issue forthwith, or at some day to be named in such certificate, and subject or not to any condition or qualification, and in case of a verdict for the plaintiff, then either for the whole or any part of

the sum found by such verdict; in all which cases a rule for judgment may be given, costs taxed, and judgment signed forthwith, and execution may be issued forthwith or afterwards, according to the terms of such certificate, on any day in vacation or term; and the postea with such certificate, as a part thereof, shall be entered of record as of the day on which the judgment shall be signed; although if the distringas juratores, or habeas corpora juratorum, may not be returnable until after such day: provided always, that it shall be lawful for the party entitled to such judgment to postpone the signing thereof."

be of *Hilary term*, was not sustained by the record, granted to *Manuel*, the defendants' counsel, a rule nisi for entering judgment for the defendants on the second day of the following *Trinity term*, unless on that day cause should be shown to the contrary.

On the 17th of May, *Taunton, J.*, made an order that the plaintiff should have leave to amend the declaration, issue, and record, upon payment of costs. The plaintiff amended the declaration in the present action, by stating that the judgment was obtained on the 15th day of March.

In *Trinity term* last *Thesiger* shewed cause against the rule nisi to enter up judgment for the defendant; and the record and amended declaration being produced in Court, he contended that the proceedings were now regular.

*Manuel*, contra, applied to the Court to rescind the order of *Taunton, J.*, authorizing the amendment; and contended that the certificate for execution in pursuance of 1 *Will. 4*, c. 7, s. 2, should have been stated in the declaration.

By the COURT (a).—No such statement is necessary, as the Court will take notice that a judgment may now be signed in vacation; for by the 3d section of the 1 *Will. 4*, c. 7, it appears that a judgment signed in time of vacation, by virtue of the 2d section of that act, is made as effectual as if it had been recorded according to the course of the common law.

The record is erroneous; for the judgment is stated to be of the 15th *March*, the *postea* and return of the *distringas juratores* being stated to be of the 15th *April*. The record must be amended; for as it stands at present, the judgment does not appear to be upon a finding by a jury. The plaintiff may amend the *postea* in the action against *A. B.* upon payment of costs, and the defendant shall be at liberty to plead *de novo*.

Rule granted.

(a) *Littledale, Parke, and Patterson, JJ.*

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# MEMORANDA.

THE judgment of this Court in *Carvalho and others v. Burn* (ante, vol. i. 700), was affirmed in the Exchequer Chamber, 23 June, 1894. *Vide post*, vol. iii.

A writ of error is pending in the Exchequer Chamber upon the judgment of this Court, in *Doe d. Galini v. Galini*, ante, 619.

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 2. The Court will not grant a rule for taxation of an attorney's bill of costs at the instance of a third party, who makes the application simply for the collateral purpose of reducing the bill so low as to make him a bad petitioning creditor. *Clutterbuck, assignee of Gingel, v. Coombs.* *Gingel v. Nichols.* 209

## II. Lien.

3. *A.* the attorney of *B.*, an intended mortgagee, has no lien as against *C.* the intended mortgagor, for the costs of preparing the mortgage upon deeds delivered by *C.* to *B.*, and by the latter handed over to *A.* for the purpose of investigating *C.*'s title. *Pratt v. Vizard, and Blower.* 455

## III. Privileged Communication.

4. An attorney is bound to give evidence of a statement made by himself to the adverse party, by the direction of his client. *Ripon, Gent. one &c. v. Davis.* 310

## AWARD

See ARBITRAMENT.

## BANKER.

### I. Liability of.

1. Money deposited with bankers is, in law, a loan by the customer to the banker. *Sum and others v. Bond and others.* 608
2. A banker was, before 1844, not liable to pay interest on money deposited, although at the time of the deposit it had been

declared that interest should not be payable upon a certain event which did not happen. *Edwards and others v. Vane and another.* 120

**BANKRUPT.**  
1. *Case upon sect. 52.* (Surety.)

A. surety with B. for C., is compelled to pay the debt after the bankruptcy of B. The certificate of B. is no answer to the action of A. for contribution. *Elements v. Langley.* 269

See **BARON AND FEME**, I. 2—  
Set-Off.

11. *Case upon sect. 72.*  
(Reputed Ownership.)

2. If A., the true owner of goods in the order and disposition of B., demand them from B. before he commits an act of bankruptcy, they will not pass to B.'s assignees, under 6 Geo. 4, c. 16, s. 72. *Smith and Topping.* 421

3. The furniture of a coal mine is property of which the party who works the mine is the reputed owner, and which upon his bankruptcy will vest in the assignees, under 6 Geo. 4, c. 16, s. 72. *Coombs and others v. Beaumont.* 235

III. *Case upon sect. 82.*  
(Fraudulent Preference.)

A preference by an insolvent trader to a particular creditor is not fraudulent, if originating bona fide in the urgency of the creditor. *Morgan and others v. Brundrett.* 280

IV. *Case upon sect. 92.*  
(Evidence of Bankruptcy.)

See **NEW TRIAL.**

**BARON AND FEME.**

1. *Privilege of Wife.*

By a discharge under the Insolvent Debtors' Act, debts contracted by the wife of the insolvent, during the husband's imprisonment, are extinguished, and do not

survive, against her upon the death of the husband. *Lackwood, and another v. Salter and wife.* 255

II. *Separate Property.*

And see **POWER.**

2. The existence of what is called the separate property of the wife, consisting of property in which the legal ownership is in others, though held for her benefit, cannot, in a court of law, affect the operation of the discharge of the husband under the Insolvent Debtors' Act, (or of his bankruptcy and certificate,) in extinguishing the ante-nuptial debts of the wife. If it could, the existence of such property should be replied specially to a plea setting up such discharge &c.; but would form no objection to such plea on demurrer. *Ibid.*

3. Husband alone may make a tenant to the præcipe, in a recovery to be suffered of the wife's land. *Doe d. Smith v. Bird.* 679

4. Such recovery will bind the wife and her heirs, unless reversed within twenty years after coverture determine. *Ibid.*

See **POWER.**

**BASTARD EIGNE, 502, (6).**

**BEER ACT.**

1. The Beer Act (1 Will. 4, c. 64,) does not abrogate a custom in a borough, that no one shall sell beer within the borough except a freeman, licensed by the mayor. *Mayor &c. of Leicester v. Burgess.* 131

**BILLS AND NOTES.**

And see **PLEADING—PRACTICE.**

I. *Stamp.*

1. A bill of exchange, purporting to be payable two months after date, is properly stamped with the duty imposed on bills payable at two months after date, though it issued



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- before the day on which it bears date. *Williamson v. Garratt*. 49
2. A promissory note, payable to M. M., without the words "order" or "bearer," and without any indication of the time of payment, is not a promissory note payable to the bearer on demand, within 55 Geo. 3, c. 184, sched. Part. I. *Cheet-ham and wife v. Butler*. 453

### II. Action on.

3. Where to a count on a promissory note, payable by instalments, averring non-payment of such instalments, the defendant pleads non-assumpsit, and brings into Court a sum of money less than the amount of the instalments, he thereby admits the special contract, but does not admit the non-payment of the instalments, except to the extent of the money brought in. And if he also plead the statute of limitations, he will be entitled to a verdict, unless the plaintiff prove a sufficient acknowledgment of a liability to pay something ultra the sum brought into Court. *Reid and another v. Dickens*. 389

## BILLS OF LADING.

### And see FREIGHT.

1. An equitable right of quasi stoppage in transitu remains in the vendor, notwithstanding an indorsement of the bill of lading by the vendee to a person who advances money on the security of such indorsement; but such right of the vendor is subject to the right of the indorsee, to be repaid his advances. *In re Westzynthius*. 644
2. The vendor has an equity to require the indorsee of the bill of lading to repay himself out of other property of the vendee in his hands, as far as such other property will extend. *Ibid*.
3. And if the indorsee apply the proceeds of the property so equitably

## BRIDGE.

stopped in transitu in payment of his debt, there being other property of the vendee in the indorsee's hands, the vendor will have a lien upon the interest of the vendee in such other property. 644

## BILL OF MIDDLESEX.

An alias bill of Middlesex may, since the Uniformity of Process Act, be signed by the seal usually affixed to a writ of summons. *Finney v. Montague*. 802

## BOND.

See 231, (a)—EVIDENCE.

### I. Suggestion of Breaches.

1. A bond conditioned for the payment of a sum of money, at the end of five years, with half-yearly interest in the meantime, with a proviso that upon default in payment of interest the principal shall be payable, was held not to be within 8 & 9 Will. 3, c. 11, s. 8, as to assessment of damages. *Jones v. Thomas*. 663

### II. Extent of Liability of Obligor.

2. Obligor cannot at law recover beyond penalty. 251, n.
3. So in equity. *Ibid*.

## BOUNDARY.

### See GRANT.

### I. Construction of Grant.

1. By a demise of land situate at Dale, and now in the occupation of J. S., lying within certain boundaries, land within the boundaries passed, though not in the occupation of J. S. *Doc d. Smith v. Galloway*. 240

## BRIDGE.

### I. By whom repaired.

1. A county bridge having been washed away, was, after passing of 43 Geo. 3, c. 59, rebuilt wider than

## COMMON.

before, and without notice to the county surveyor, by an adjoining parish, partly with the old materials, and in the same line of passage over the river. *Held*, that the county was liable to repair, and that this was not a new bridge within the meaning of that act. *Rex v. Inhabitants of Devonshire.* 212

## BUILDING ACT.

*See* STATUTE.

## CAPACITY.

*See* FELONY.

## CASE, ACTION ON THE.

1. Case will lie against a landlord, who, having distrained goods sufficient to pay his rent, abandons the distress, and afterwards makes a second distress for the same rent. *Smith v. Goodwin.* 114

## CERTIFICATE OF CONFORMITY.

*See* BANKRUPT—SET-OFF.

## CERTIFICATE OF SETTLEMENT.

1. An old certificate, by which the parish of Dale acknowledge to the parish of Sale that *A.* is settled in Dale, produced by the overseers of Sale, on the trial of an appeal between Dale and a third parish, may be presumed to have been originally a perfect instrument, though the allowance of two justices does not now appear upon it, part of the document being torn off. *Rex v. Inhabitants of Slaithwaite.* 347

## CIVIL DEATH, 498, (b).

## COMMON.

*See* INCLOSURE ACT.

## CONVICTION. 859

## COMPOSITION.

*See* DEBTOR AND CREDITOR.

## CONDITIONAL UNDERTAKING.

*See* APOLOGY—COVENANT.

## CONSIGNOR.

*See* FREIGHT.

## CONSTRUCTION.

*See* GRANT—STATUTE—WILL.

## CONSTRUCTIVE SERVICE.

*See* SETTLEMENT, 2.

## CONTUMACE CAPIENDO.

1. It is competent to the Court of Chancery to issue several concurrent writs de contumace capiendo into different counties. *Rex v. Blake, Esq.* 312
2. A contumace capiendo may be returnable on or after the essoign day of the term. *Ibid.*

## CONTINUING BREACH.

*Doe v. Pritchard*, third point. 489

## CONTRIBUTION.

*See* BANKRUPT, 1.

## CONVEYANCE.

1. A voluntary conveyance from *A.* to *B.* and *C.* in trust, is defeated by a subsequent conveyance from *A.* to *B.* for a valuable consideration. *Doe v. Botterill.* 64

## CONVICTION.

*I. Form of.*

1. In a conviction under 11 *Geo.* 2, c. 19, for fraudulently and clandestinely removing goods to prevent a

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distress, it must distinctly appear that the complainant is the landlord or the agent, bailiff or servant of the landlord, and that the party removing is the tenant. *Rex v. Davis.* 349

### COPYHOLD.

See STAMPS, 2—EJECTAT.

#### I. Surrender.

1. Copyholds are within the statute against fraudulent conveyances. (27 *Eliz. c. 4.*) *Doc d. Turnstill v. Botterill.* 64
2. Nothing vests in surrenderee before admittance. *Rex v. Mildmay.* 802
3. Surrenderor still tenant for purpose of services. *Ibid.*
4. So, for purpose of forfeiting. *Ibid.*
5. Surrenderee not affected by mesne incumbrances. *Ibid.*

#### II. Forfeiture.

6. Where in ejectment by the lord against a copyholder for a forfeiture by waste, the jury find there has been no damage, there is no waste and no forfeiture. *Doc d. Grubb v. The Earl of Burlington.* 534

## CORONER.

#### I. Inquest.

1. The Court will ex officio quash a coroner's inquisition in which the facts of the case are stated and the verdict found is not warranted by such facts. *In the matter of the Inquisition on the body of Robert Culley, deceased.* 61

## CORPORATION.

#### I. Corporate Seal.

See EVIDENCE.

#### II. Election to Corporate Offices.

1. Where the right of election of an alderman is by custom in the citizens, but the court of aldermen has the power of rejecting the

## COSTS.

party returned, as shown by the fact, it is not inconsistent to set aside a mandamus to admit to the office of alderman, that the petitioner was elected by the citizens according to the custom, but was rejected by the court of aldermen, and was not duly elected. *Rex v. Mayor and Aldermen of London.* 126

#### III. Contracts of, with Members of Corporation.

2. A member of an incorporate company, entering into a contract with that company, must be deemed in respect of that contract a stranger. *Hill v. Manchester and Salford Waterworks Company.* 573

## COSTS.

See APOLOGY.

#### I. Of Indictment.

1. A public body, at its own expense, prefers an indictment against *A.* for a libel upon *B.*, one of its officers, in the name of *B.* as prosecutor. *A.* removes the indictment by certiorari and is convicted. No costs can be awarded under 4 & 5 *W. & M. c. 11, s. 3.* *Rex v. Dewhurst.* 253

#### II. Under 43 Geo. 3, c. 46.

And see ARREST.

2. *B.*, a builder, is employed by *A.* in altering *A.*'s house; during the progress of the work *A.* countermands the employment, whereupon *B.* requests *A.* to appoint a valuer. *B.* receiving no answer to his application, completes the work and arrests *A.* for the whole amount, but recovers only for the work done previously to the countermand. The defendant is entitled to costs. *Russell v. Atkinson.* 667
3. A party is not warranted in arresting another for a debt of which he has no, at the time of making the arrest, some evidence besides his own consciousness; and therefore a

## COUNTY.

plaintiff arresting another for a large sum of money, and having at the time of arrest evidence only as to a small portion of the amount, was held to be liable to costs, although at the time of the trial some evidence of an acknowledgment subsequent to the arrest was given. *Griffiths v. Pointon* 675

### III. Upon New Trial.

4. Where a new trial is granted upon payment of costs, remanet fees, although incurred before the unsatisfactory trial, are to be paid by the party impugning the verdict. *Robinson v. Day.* 670

See 670, note (a).

### IV. Attachment for Nonpayment.

5. Upon a motion for an attachment for nonpayment of costs, pursuant to the Master's allocatur, to whom accounts had been referred upon the undertaking of the party, the Court refused to grant a rule absolute in the first instance, and this is the practice of all the Courts. *Rex v. Spraggs.* 678

## COURT MARTIAL.

1. A prohibition cannot issue to a court martial, after sentence pronounced by the court and ratified by his majesty, and execution, by dismissal from the army, in pursuance of such sentence. *In the matter of John Walter Poe.* 686

## COURT OF REQUESTS.

See GAOL.

## COUNTY.

1. By an act of parliament a district is taken out of the county at large, and annexed to the county of a city, and is declared to be member and parcel of the county of the city, except for certain purposes.

## COVENANT. 861

In a house situated in the annexed district be feloniously demolished by rioters, the owner may sue the inhabitants of the county of the city for the amount of his damages, under 7 & 8 Geo. 4, c. 31, if such liability is not mentioned among the exceptions, although it may not clearly appear that the defendants could reimburse themselves by a rate which should embrace the annexed district. *Humphreys v. Inhabitants of Bristol.* 74

## COVENANT.

### I. When performed.

1. Where a vendor covenants to deduce a good title at A., B., or C., on or before a certain day, a plea that he was ready to deduce a good title at that time, without averring notice to the covenantee at which place he would be ready to deduce such title, is insufficient. *Rapin, gall v. Lloyd.* 410
2. Also a plea that by a subsequent agreement, not under seal, made before breach, the time for deducing such title had been enlarged, and that the defendant was ready to deduce such title within the enlarged time, is insufficient. *Ibid.*
3. Also a plea, that, in consideration the defendant would deduce a good title and convey, after breach, the plaintiff agreed to accept such title and conveyance at a later day, is insufficient. *Ibid.*

### II. Covenant for quiet Enjoyment.

4. A covenant by A. with B. for quiet enjoyment during the life of A., amounts per se to a lease for the life of A. *Doe v. Dodd.* 838

### III. Whether conditional.

5. A covenant by lessor that lessee paying the rent and performing covenants shall quietly enjoy, is not a conditional covenant, and a plea setting the non-payment of the

rent, or the non-performance of a covenant by the lessee, (to insure,) is no bar to an action by the lessee on the covenant for quiet enjoyment. *Dawson v. Dyer, Bart.* 559

And see *Yardrew v. Bryok*, 835.

#### IV. To indemnify, when to be sued upon.

6. By an indenture, reciting that *A.* has agreed to pay *C.* a debt owing to him from *B.*, *A.* covenants with *B.* to indemnify *B.* in respect of such debt. *A.* omits to pay *C.*, who sues and obtains judgment against *B.* *B.* may recover the amount of the debt from *A.* before he has paid *C.* *Carr v. Roberts.*

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#### V. Covenant to stand seised.

7. In articles under seal, after a recital of an intended marriage between *B.* and *C.*, *A.* (the father of *B.*) "for the support and settlement in the world of the young couple, freely and clearly giveth and settleth upon *B.* his lands, from Michaelmas next, for life," remainder to the first son of the marriage, and so on successively for every other son, with remainders over. This is a covenant to stand seised, and not an executory contract. *Doe v. Williams.*

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And see 602, n. (a) and (b).

### CRIMINAL INFORMATION.

See AFFIDAVIT—JUSTICES.

#### CROWN.

See FELONY.

#### CURATE.

See SETTLEMENT.

#### CUSTOM.

And see BEER ACT.

1. A custom in a borough for the leet jury of the borough, being also

leet jury of the manor, to elect the members of the corporation in which the government of the borough is vested, is a reasonable and legal custom, although the manor and borough be not shewn to be co-extensive. *Rez v. Duke of Beaufort and others.* 815

### DEBTOR AND CREDITOR.

And see BILL OF LADING.

1. A party who, in the character of servant to a debtor, receives money from his master to discharge the debt, is not liable to be sued by the creditor as for money received to his use. *Howell v. Ball.* 381
2. Where, at a meeting of creditors of *A.*, it is agreed that a composition of 6s. in the pound shall be accepted, and that promissory notes for the amount "shall be given within fourteen days to the creditors assenting thereto within that time," and *A.* is sued for a debt due to one of the parties to the agreement, unless *A.* can shew a delivery or tender of the note, he is liable for the whole debt. *Oughton v. Trotter.* 71

### DEDICATION TO THE PUBLIC.

See HIGHWAY.

### DEED.

#### I. Construction of.

See CONVEYANCE—COPYHOLDS—COVENANTS—EMBLEMENTS, 8—FIXTURES—TITLE DEEDS.

1. A demise by *A.* to *B.* for the term of his natural life, may enure as a demise either for the life of *A.* or of *B.* according to circumstances. *Doe v. Dodd.* 838
2. *Semble*, that if the habendum be to *B.* his executors, administrators, and assigns, a presumption is created in favour of the demise being for the life of *A.* *Ibid.*

## DEFORCEMENT.

3. Such presumption is confirmed by a covenant by A. with B. for the quiet enjoyment during the life of A. *See* *Read v. Taylor*. 638

## DEFACTION.

*See* *Apology*.

1. A statement made by the late master of a servant to another person who had thoughts of engaging that servant, is not privileged, where from other evidence, though of a slight description, the jury has inferred actual malice. *Kelly v. Partington*. 460

2. An allegation in a declaration for slander, that the defendant said of the plaintiff, in her character of shopwoman, "she secreted 1s. 6d. under the till, stating these are not times to be robbed," was held to impute that the plaintiff, when secret- ing the 1s. 6d., used the latter words, and that, therefore, the al- legation did not contain that which was actionable per se, so as to disen- title the plaintiff to full costs, where the verdict was under 40s. *Ibid*.

3. Where, in an action for slander, the declaration alleged that the de- fendant had said of the plaintiff that he had set fire to his own pre- mises, inuendo, that the plaintiff had been guilty of wilfully setting fire to the premises, which, whilst in his occupation, had been de- stroyed by fire; the Court will not, after verdict, presume that the jury have found that the defendant meant to impute to the plaintiff that he did the act unlawfully or feloniously as well as wilfully. *Sweetapple v. Jesse*. 36

4. Nothing more will be presumed after verdict than was necessary to support the allegations in the de- claration. *Ibid*.

## DEFORCEMENT.

1. A feoffment by one parcener, who occupies alone under a general en-

## DEVISE.

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try, operates as a conveyance of her own property, and a devise- ment to her co-parceners. *See* *d. Read v. Taylor*. 608

## DELIVERY ORDER.

*See* *LIEN*.

## DEMISE.

*See* *POWER—BOUNDARY*.

## DEPOSIT.

*See* *AGENT—BANKER*.

## DEVISE.

*And see* *WILL—POWER*.

1. Under a devise to A. for life, re- mainder to the right heir male of the testator in fee, the remainder vests, upon the death of the testa- tor, in the person then answering the description of the heir male. *Doe v. Spratt*. 524

2. Under a devise of a house without words of inheritance, the devisee takes only a life estate, although by the will the deviser professes to dispose of his "worldly estate." *Doe v. Gwillim and others*. 247

3. A. devises Whiteacre to B. for life, remainder to the first and other sons of B. in tail male. After the death of A. and B., C. the first son of B., enters, suffers a recovery, and resettles Whiteacre by a deed to which Z. is an executing party, as trustee of a term, and thereby creates a power of incumbering. Z. afterwards devises Blackacre to E., the second son of C., in tail, with a limitation over in case Whiteacre shall descend to or de- volve upon him. D., the eldest son of C., dying in his lifetime, E., upon the death of C., takes White- acre, subject to an incumbrance created under the power: Held, by Denman, C. J., Parke and Patte-

son, J.J., dissentiente, *Taunton, J.*, that C. is not incapacitated from holding both estates. *Tazakerly v. Ford.* 1

### DISCLAIMER OF TENANCY.

1. "I have no rent for you, because A. B. has ordered me to pay none." This is evidence of a disclaimer of tenancy. *Doe v. Pittman.* 673

### DISCHARGE.

See MASTER and SERVANT, 227.

### DISSEISIN, 509 a.

### DISTRESS.

#### I. For Poor-Rate.

And see CASE—JUSTICES—REPLEVIN BOND.

1. An order of magistrates being made upon a party to pay the amount of his poor-rate and the costs of a summons, he tenders the former without the latter to the overseer. A subsequent warrant of distress for the poor-rate is illegal. *Cotton v. Kadwell.* 399

### EASEMENTS.

And see GRANT.

1. Under the words "Appurtenances," an easement which has become extinct (as by unity of possession) or which has no legal existence, though enjoyed de facto, does not pass. *Plant v. James.* 517
2. To revive an easement legally extinguished, (as where there has been unity of possession,) but subsisting de facto, the grantor should use express words of creation, or introduce the terms "therewith used and enjoyed." *Ibid.*

### EJECTMENT.

#### EJECTMENT!

And see EVIDENCE.

1. *Staying Proceedings until Payment of Costs.* 352
1. A second ejectment will be stayed until the payment of costs of a former ejectment on the same title, when in the first ejectment the plea has been filed, and the draft-consent rule drawn up but not entered into. *Doe d. Langdon, v. Roe; Doe d. Langdon v. Langdon.* 848
2. Proceedings were stayed in a second ejectment on the several demises of A., an insolvent debtor, and of B., his assignee, until payment of the costs of a former ejectment brought by A. *Doe v. Roe.* 468

#### II. Form of Declaration.

3. *Semble*, that in ejectment, the omission of all local description of the tenement demised is error, though the county and vill in which the demise was made are stated in the declaration, and the county is stated in the margin. *Doe v. Bath.* 440
4. Pending a rule nisi to arrest judgment on the ground of such error, the Court allowed the plaintiff to amend the declaration and issue, on payment of the costs of both rules. *Ibid.*
5. A notice at the foot of a declaration in ejectment, advising the tenant to appear and defend *duo* time, is insufficient. *Doe v. Roe.* 476

#### III. Consent-rule.

6. A rule for an attachment for non-performance of the terms of the consent-rule in ejectment is properly entitled as in an action against the casual ejector, although obtained upon affidavits entitled as in an action against the tenant. *The King v. Bryant.* 666

IV. *Miscellaneous.*

## See PRESUMPTION—FELONY.

7. Plaintiff to recover by strength of his lessor's title. 225
8. Proof that a right of entry has accrued. *Ibid.*
9. Proof that a right of entry has not accrued within 20 years. *Ibid.*

## ELECTION.

## And see MANDAMUS.

1. To impeach the election of a party returned as elected, it is not sufficient to allege that many of his votes were bad and fictitious, without shewing that some other candidate had a majority of legal votes. *Rex v. Jefferson, Esq.* 487

## ELECTION BY VESTRY.

## See MANDAMUS.

## EMBLEMENTS.

I. *What Crops within the Privilege of Emblements.*

1. Emblements can only be claimed in respect of crops which grow by the industry and manurance of man, and which ordinarily repay the labour by which they are produced within the year in which the labour is bestowed, though in extraordinary seasons they may be delayed beyond that period. *Graves v. Weld.* 725
2. Tenant entitled to emblements can have only one crop of the thing sown, i. e. the crop growing at the time of the determination of his tenancy, although such one crop may not in its nature be calculated to compensate him for the industry and manurance bestowed. *Ibid.*
3. Tenant *pur autre vie* sows clover with barley in the spring: the estate determines in the summer by death of *cetteux que vies*: in

the autumn the barley is cut, and with it some clover, which increases the value of the straw; but the tenant is not nor expects to be compensated for the industry and manurance bestowed on the clover, ~~except by a crop, which is not obtained until more than twelve months after the clover seed was sown.~~ Held, that this was not an annual crop of which emblements could be taken; and also that the tenant must be considered as having taken the growing crop at the time when the barley was cut. 725

4. Emblements defined. 734, n.
5. No emblements by Roman law. 735
6. Nor by-law of France. *Ibid.*
7. Qualified right, by custom of Normandy. *Ibid.*

II. *How transferred.*

8. By deed, at common law. 731, n.
9. By testament of dowress, under statute of Merton. *Ibid.*
10. By devise from incumbent, under 28 H. 8, c. 11. *Ibid.*

See also 731, note (4)—734, note (a).

## ENTRY.

## See FEOFFMENT—FINE.

1. A right of re-entry under a lease is waived by acceptance of the reserved rent, though from a stranger. *Doe v. Pritchard.* 489
2. Entry, proviso of in a lease. 561, note (b).

## ESCHEAT.

I. *For Felony.*

1. Upon a felony committed by surrenderor before admittance of surrenderee, the copyhold escheats to the lord. *Rex v. Lady of Manor of Marwell.* 778
2. So, although the surrender be by way of mortgage. *Ibid.*



## ESCROW.

I. *At what time to enter as a deed.*

1. Where *A.* executes a deed, and delivers it to *B.* as an escrow, to be delivered to *C.* on a certain event, possession of the deed by *C.* is *prima facie* evidence of the performance of the condition. *Hart v. Horton.* 428

## ESTOPPEL.

I. *By Sheriff's Return.*

1. *Scemle*, that the assignees of a replevin bond are not estopped from replying a fact contrary to the sheriff's return to a *re fa lo*. *Harrison v. Wardle.* 708

## EVIDENCE.

I. *Presumptive or conclusive.*

1. In an action for a malicious arrest, the jury may imply malice from the absence of reasonable or probable cause. *Mitchell v. Jenkins.* 301
2. This, however, is an inference not of law, but of fact, which the jury are not bound to draw. *Ibid.*
3. Presenting to the jury the absence of such cause as conclusive evidence of legal malice, is a misdirection. *Ibid.*

II. *Presumption as to Time of Death.*

4. Ejectment, brought by a remainder man more than twenty but less than twenty-seven years since the tenant for life was last heard of, cannot be supported without other evidence from which the jury may infer that tenant for life was alive within twenty years. *Doe v. Nepean, Bart.* 219
5. Though where a party has not been heard of for seven years after going abroad, he will, at the expiration of that time, be presumed to be dead, there is no presumption received by the law as to the time

when the death actually took place. This is a matter concerning which the jury must form their own opinion upon the particular facts of the case. *Ibid.*

III. *Recitals.*

6. Where *A.*, a party to a conveyance, is therein described as heir at law of *B.*, a surviving devisee of a legal estate, such description is not evidence of the prior death of the co-devisees of *B.*, or that *A.* is heir of *B.*, even against another party who executed the conveyance. *Doe v. Dodd.* 838

IV. *Res judicata.*

7. An order of sessions, confirming an order of removal, is conclusive as against all the world. *Re v. The Inhabitants of Wick St. Lawrence.* 289
8. An order of sessions, quashing an order of removal, is final between the parties only upon the point which formed the actual ground of decision. *Ibid.*
9. Upon the trial of an appeal against a second order of removal of the same pauper, between the same parishes, parol evidence is admissible to shew the particular grounds of the former decision; and if it appear that the question of settlement was not on that occasion adjudicated upon, the first order is not final upon that point. *Ibid.*

V. *Privileged Communication.*

10. An attorney is bound to give evidence of a statement made by himself to the adverse party by the direction of his client. *Atton, Gent. one &c. v. Davies.* 310

VI. *Written Instruments.*

11. Where *A.* executes a deed, and delivers it to *B.* as an escrow to be delivered to *C.* on a certain

event, possession of the deed by C. is *prima facie* evidence of the performance of the condition. *Hare v. Horton*. 428

12. The production of a writ indorsed "oath for 76l." is sufficient evidence that the sum indorsed therein was the amount for which the party was arrested. *Brown v. Dean*. 316

13. In debt on bond against an incorporated company, where it is shewn that the bond has been sealed with the seal of the company by the proper officer, it is competent to the defendant, under *non est factum*, to prove that several of the requisitions of the act necessary to validity of the execution have not been complied with. *Hill v. Manchester and Salford Waterworks Company*. 573

14. Partnership books are evidence against partners on the principle that they are the acts and declarations of such partners, being kept by themselves, or by their authority by their servants, and under their direction and superintendence. *Ibid*.

15. Entries in the books of an incorporated company are not evidence against a member of the company in respect of a contract entered into by him with the company, although the act by which the company is incorporated authorizes each member to inspect and take copies of the books or any part of them. *Ibid*.

#### VII. Parol Evidence.

16. The opinions of underwriters as to the materiality of communicating information as to a particular fact, previously to the effecting of a policy, is not admissible in evidence. *Campbell v. Richards*. 542

17. The materiality of such a communication is a question for the jury, not for the court. *Ibid*.

#### EXCLUSIVE OCCUPATION.

See POOR-RATE.

#### EXECUTION.

And see FALSE IMPRISONMENT.

1. Awarded for the king where his title appears in pleadings inter alios. 498 (c).
2. On a warrant of attorney, subject to a defeazance, given to secure a sum to be paid by instalments, the defendant having been taken in execution for one instalment, may be brought up by habeas corpus, and charged in execution with a further instalment, without a rule to shew cause. *Davis v. Gempert*. 607

#### EXILE OF MEN, 541 (a).

#### FALSE IMPRISONMENT.

1. Trespass lies against a sheriff for an arrest made by his officer by colour of a warrant under a *fi. fa.* *Smart v. Hutton*. 426

#### FELONY.

##### I. Forfeiture by.

1. A freehold interest is not divested out of an attainted felon until office found. *Doe v. Pritchard*. 489
2. Under a demise by the felon after attainder, the lessee has a good title against all but the king and the lord of whom the land is holden. *Ibid*.
3. Such attainted felon is therefore a good lessor in ejectment. *Ibid*.
4. Lands forfeited for a year and a day by custom of Gloucester. 249 (a)

#### FEOFFMENT.

##### I. Mode of delivering Seisin.

1. Livery of seisin is not invalidated by omitting to remove from the

house or land a child found there, unless that child be part of the family of a person having an immediate estate or interest in the premises, placed there for the purpose of continuing the possession of such person. *Doe v. Taylor*. 508

## II. Effect of Conveyance.

2. A feoffment by one parcener, who occupies alone under a general entry, operates as a conveyance of her own purparty and a forfeiture of her coparceners. *Ibid*.

## FIERI FACIAS.

1. Party arrested under, may maintain false imprisonment against sheriff. *Smart v. Hutton*. 426

## FIERI FACIAS DE BONIS ECCLESIASTICIS, 230.

See SEQUESTRATION.

## FINE.

### I. How avoided.

1. An entry to avoid a fine must be made animo clamandi, but it need not be accompanied with a declaration that the object of the entry is to avoid the fine. *Doe v. Williams*. 602

*Doe v. Pritchard*. 500

## FIXTURES.

1. By the grant of a house all the fixtures pass. *Hare v. Horton*. 428
2. *Secus*, where by an enumeration of particular fixtures in the conveyance, an intention is shewn to exclude other fixtures of greater value and importance. *Ibid*.

## FORFEITURE.

### I. Where incurred.

And see FELONY.

1. In ejectment by the lord against

## FRAUD.

a copyholder for a forfeiture by waste, the jury find otherwise but no damage, there is no waste and no forfeiture. *Doe v. The Earl of Burlington*. 494

11. Who may enter for a forfeiture.

2. Whether assignee of reversioner may enter in respect of forfeiture committed before assignment, *quere*. *Doe v. Pritchard*. 489

### III. Waiver of.

3. A right of re-entry upon a forfeiture under a lease is waived by acceptance of the reserved rent, though from a stranger. *Ibid*.

## FRAUD.

See SETTLEMENT—COPYHOLD.

1. A voluntary conveyance by A. to B. and C., is defeated by a conveyance from A. to B. for a valuable consideration. *Doe v. Botterill*. 64

## FRAUDS, STATUTE OF.

### I. Interest in Land.

1. A purchaser, who in his written contract stipulates for a good title, cannot be required to complete the purchase upon a defective title, on the ground of a verbal waiver of the stipulation for a good title. *Goss v. Lord Nugent*. 28

## FRAUDULENT PREFERENCE.

See BANKRUPT, IV.

## FRAUDULENT REMOVAL OF GOODS TO PREVENT DISTRESS.

See JUSTICES—CONVICTION.

## FREIGHT.

1. The consignor is liable for freight, although by the bill of lading

the goods are to be delivered to the consignee, who pays freight for them same, and they are delivered at the consignee without payment being required. *Dewett and others v. Beckford.* 374

2. Mode of presenting consignee from liability to pay freight. 376 (a)

## GAOL.

And see ARREST.

1. The power of the commissioners under the First Tower Hamlets Court of Requests Act (23 Geo. 2, c. 20,) to commit debtors in execution to the House of Correction, was taken away by the General Gaol Act, (4 Geo. 4, c. 64,) and a classification of prisoners in pursuance thereof; and it is not restored by the Tower Hamlets Court of Requests Act (1 Will. 4, c. 45.) *Rex v. Governor of House of Correction for Middlesex.* 138

## GLEBE.

See JUDGMENT, 1.

## GOODS.

### I. Property in.

1. Vested in defendant by recovery in an action of trespass de bonis asportatis. 655 n.
2. So, by recovery in trover. *Ibid.*
3. Secus, by recovery in detinue\* or replevin. *Ibid.*
4. Whether passing by sale or by gift, without delivery. 203 n.

\* But if after a judgment in detinue in the alternative to recover the goods detained or their value, the plaintiff elects to proceed for the value by issuing a fieri facias, elegit, or capias ad satisfaciendum, instead of a distringas ad deliberandum, the parties appear to be placed in the same situation as upon a judgment in trespass or trover.

VOL. II.

## GRANT.

And see BASEMENT.

### I. Construction of Grant.

1. A. and B., coparceners, convey to C. Whiteacre and Blackacre, together with all ways therewith usually held, used, occupied, or enjoyed,—as to Whiteacre and the appurtenances, to the use of A. and his heirs; and as to Blackacre and the appurtenances, to the use of B. and his heirs. A way used before the partition, from Whiteacre over Blackacre, does not vest in A. under this deed. *Plant v. James and another.* 517
2. A grant of Whiteacre and Blackacre, "with all ways used, occupied or enjoyed *therewith*," extends to ways used, &c. over other lands of the grantor, but does not convey to the grantee a right to ways used to and from one of those parcels over the other of them. *Plant v. James and another.* 517

## GUARANTEE.

1. A. being arrested at the suit of B., upon a writ indorsed "oath for 76l.," C. writes that in consideration of B.'s instantly discharging A., he will give his promissory note to B. for ten shillings in the pound upon the debt on the arrival of the discharge. This engagement may be declared upon as a promise to pay ten shillings in the pound upon the debt for which A. was arrested. *Brown v. Dean.* 316

## HABEAS CORPUS, 314.

See ARREST.

## HERIOT.

1. Where a heriotable tenement is severed, the lord is entitled to a separate heriot in respect of each portion of the tenement, 798 n.

3 M

## 870 INCLOSURE ACT.

2. And the liability to pay several heriots continues after the portions are reunited, if during the severance the lord has had seisin of the several heriots. 798 n.

### HIGHWAY.

1. Where a statute prohibits the erection of buildings within ten feet of a certain road, and directs that the footpaths shall be deemed part of the road, a building erected within ten feet of the footpath is within the prohibition. *Rex v. Gregory.* 478
2. A road dedicated to and used by the public, becomes a highway, which the parish must repair, although neither such dedication nor such user have been adopted or acquiesced in by the parish. *Rex v. Inhabitants of Leake.* 583
3. Where drainage commissioners are directed by act of parliament to purchase lands, cut drains, and cleanse them when cut, by placing the mud upon the banks, it is competent to such commissioners to dedicate such banks to the public as a highway; per *Denman, C. J.* and *Parke, J.*; dissentiente *Littledale, J.* *Ibid.*
4. Whether one act of repairing on the part of the parish can be construed as an adoption of a highway, supposing such adoption to be material, *quære.* *Ibid.*

### IMPARTIAL TRIAL.

See VENUE.

### INCLOSURE ACT.

1. An act for inclosing a common, which directs that the allotment of the commoners shall be deemed to be within the township wherein the land of such commoners lie, does not alter the rights, or liabilities of the owner of coal mines, (by changing the locality of such

## INDICTMENT.

- mines,) either worked or unworked, under such allotment. *Rex v. Pitt, Esq.* 863
2. Where an inclosure act directs a common of pasture to be set out for the exclusive enjoyment of all the owners and proprietors of commonable messuages, to be used, stocked, and enjoyed by such owner and proprietors, as a common of pasture, in such manner as the commissioners of inclosure shall direct, no authority is given to the commissioners to enable any persons to participate in the new common, who would not have been entitled to rights of common before the passing of the act. *Mayor and Bailiffs of Godmanchester v. Philips.* 713
  3. Where, therefore, the old right was in the occupiers of commonable messuages, being freemen of the borough, the award of the commissioners attaching the new right of common to the occupiers of such messuages, without noticing the qualification of freemen, confers no title to such new right of common upon occupiers of such messuages, not being freemen. *Ibid.*

### INDEMNITY.

See COVENANT.

## INDICTMENT.

And see VENUE—NEW TRIAL.

### I. Costs.

1. A public body, at its own expense, prefers an indictment for a libel upon *A.*, one of its officers, in the name of *A.* as prosecutor. The defendant removes the indictment by certiorari and is convicted. No costs can be awarded under 4 & 5 W. & M. c. 11, s. 2. *Rex v. Dewhurst.* 253

## TO INQUISITION.

I. *Quashed for insufficiency.*

1. The Court will ex officio quash a coroner's inquisition, in which the facts of the case are stated, and the verdict found is not warranted by such facts. *In re Inquisition on the body of Robert Culley.* 61

## INSOLVENT DEBTOR.

## See BARNON AND FEME—DEBTOR AND

## CREDITOR—EJECTMENT.

## INSURANCE.

## And see EVIDENCE, 16, 17.

I. *What covered by.*

1. A policy is effected upon a ship and cargo, "at and from the coast of Africa to her port and ports of discharge in the United Kingdom, beginning the adventure upon the goods and merchandize, from the loading thereof aboard the said ship, twenty-four hours after her arrival on the coast:"—Held, that no part of the outward cargo was covered by the policy, it not appearing on the face of the policy, that the goods on board previously to the arrival on the coast of Africa, were intended to be insured. *Rickman v. Corstairs.* 562

2. Held also, that a memorandum, valuing the cargo at a certain sum, did not operate to make the policy extend to cover a loss of portions of the outward cargo, which continued on board after the vessel had arrived on the coast. *Ibid.*

II. *Valued Policy.*

3. Where in an action against an underwriter, upon a valued policy, evidence of the value of goods on board was gone into at the trial, and parts of the cargo not covered by the policy were included in the calculation, the Court sent the case back for a new trial. *Ibid.*

4. In the case of a valued policy, if part of the cargo be not on board at the time of the loss, the assured cannot recover as for a total loss, *semble.* 562

## INTERPLEADER.

1. Claimants neglecting to appear under the interpleader act, are precluded by the terms of the rule from enforcing their claim. *Ford v. Dillon.* 662

2. Award of interpleader with the Crown, where a presumption of title appears for the Crown. 493 (c)

## INTEREST.

## And see BANKER.

1. In what cases recoverable. 122

## JUDGMENT.

## And see EVIDENCE, IV.

1. Glebe land is bound by the delivery of the writ of fieri facias de bonis ecclesiasticis to the bishop, but is not affected by the judgment. *Cottle v. Warrington, clerk.* 227

2. Therefore a judgment confessed by an incumbent in the North Riding of Yorkshire, is not an incumbrance upon the land, so as to require registration under the North Riding Register Act. *Ibid.*

## JURAT.

See AFFIDAVIT—CRIMINAL INFORMATION.

## JUSTICES.

## And see CONVICTION—NEW TRIAL.

1. *Authority of Magistrates.*

1. The Court refused to interfere with the discretion of the magistrates in taking security for keeping the peace. *Rea v. Tregarthan.* 379

**II. Authority of Court of Quarter Sessions.**

- (2) After notice of appeal against an informal order of two magistrates, for payment of a sum not exceeding the value of goods fraudulently removed to prevent a distress, a formal order is drawn up and filed, of which notice is given to the appellants. The Court of Quarter Sessions is bound to try the appeal as an appeal against the original order.

**III. Protection.**

8. A magistrate is entitled to notice before an application is made for a criminal information, where he is charged with misconduct in his magisterial capacity, although other misconduct be also charged. *Re v. Healding clerk* 477

**LANDLORD AND TENANT.**

See Action, 7—CONVICTION—JUSTICES, 2.

**LEASE.**

See DEED—SETTLEMENT.

**For Life.**

1. For whose life it shall endure.

846 (a)

**For Years.**

See BOUNDARY—POWER.

**LEGACY.**

**To whom payable.**

1. On contingency of survivorship

223

**II. Duty.**

See STAMP, 2

**LEGATEE.**

See WILLS, 11.

**LESSOR.**

See COVENANT.

**LIBEL.**

See COSTS—DEFAMATION.

**INTELLIGENCE.**

See WATER, 3, 4.

**LIEN.**

And see ATTORNEY, II.

1. A. sells to B. rum lying in the warehouse of C. at L., and delivers to B. an invoice, with marks and numbers. B. accepts the draft of A. for the price, and sells to D. and obtains payment from D. The usage at L. is for the vendor to deliver to the vendee delivery orders addressed to the warehouseman, who accepts such orders. No delivery order is given by A. to B., except for a small portion of the goods, which B. receives. By the permission of B., but without the knowledge of A. D. guages and coopers the casks in the warehouse and marks them with his initials. Upon B.'s acceptance being dishonoured, A. has a lien upon the rum for the price. *Dixon v. Yates* 177

And see 468, note (b).

**LIMITATIONS.**

**I. Of Actions.**

1. Where to a count on a promissory note payable by instalments, averring nonpayment of such instalments, the defendant pleads non assumpsit, and brings into Court a sum of money less than the amount of the instalments, he thereby admits the special contract, but does not admit the nonpayment of the instalments, except to the extent of the money brought in; and if he also pleads the statute of limitations, he will be entitled to a verdict, unless the plaintiff prove a sufficient acknowledgment of a liability to pay something ultra the sum brought into Court. *Reid and another v. Dickson* 369

**II. Of Estates.**

See LEASE, I.

MASTER'S ALLOCATUR.

**LIVERY OF SEISIN.**

**See FEOTMENT, 21.**

**LOCAL DESCRIPTION.**

And see Grant, II.

# LONDON

**ISCO CORPORATION**

## LICIOUS ARREST

## See AMBUSH - EVIDENCE

# MANDAMUS

Where a statute directs an election by poll, *semble*, that the poll may be taken from the holding up of the electors' hands. But if the voters appointed to take the numbers differ, and a poll is demanded and refused, the Court will grant a mandamus to enter adjournments of the election meeting, and to proceed to complete the election. *Res v. Vestrymen and Vestry Clerks of St. Luke's, Middlesex.* 464

**MANOR.**

**See COPYRIGHT—CUSTOM.**

# MASTER AND SERVANT.

#### **I. Rights of Servant against Master.**

1. Where a servant under a general hiring at the rate of so much per annum is dismissed for misconduct, he is not entitled to any portion of the wages of the current year.

*Turner v. Robinson and others.* 829

2. So, although the master has previously recovered damages against him for the same act of misconduct, *Id.*

## MASTER'S ALLOCATUR.

... 11

THE PRESS.

## NEW TRIAL. 878

## MINERALS. II

1. **Separate inheritance in 369 (a)**



warrant not having been distinctly taken at the trial, and being stric-  
tissimi juris. *Penprase v. Johns.*

376

3. In a case within the 92d section of the bankrupt act, 6 Geo. 4, c. 16, where the assignees went into evidence of the trading, in consequence of a notice to dispute, without advertg to the section or relying upon the depositions, and having failed in establishing the trading, were nonsuited, the Court refused to grant a rule to set aside the nonsuit and for a new trial. *Johnson v. Piper.*

673

## II. Costs upon new trial.

See COSTS.

## NON EST FACTUM.

1. In debt on bond against an incorporated company, where it is shewn that the bond has been sealed with the seal of the company by the proper officer, it is competent to the defendants, under the plea of non est factum, to prove that several of the requisitions of the act necessary to the validity of the execution have not been complied with. *Hill v. Manchester and Salford Waterworks Company.*

573

## NONSUIT.

1. Entered upon different point from that reserved.

322

## NOTICE.

See APPEAL—BRIDGE—EJECTMENT, 5  
—JUSTICES, 477, n. (c).

## OFFICE.

See SETTLEMENT.

## OFFICER.

See SHERIFF.

OMNIA PRÆSUMUNTUR RITE  
ESSE ACTA, 851.

## ORDER OF REMOVAL.

See SETTLEMENT.

1. Where in the parish of Dale there are several townships not separately supporting their poor, one of which is called the township of Dale, an order of removal directed to the churchwardens and overseers of the township of Dale may be amended by the sessions into an order directed to the churchwardens and overseers of the parish of Dale. *Res v. Inhabitants of Bingley.*

103

2. The Court of K. B. will not presume a fact, by which an order of removal would be vitiated. When an order is silent as to the existence or non-existence of a fact necessary to the support of the order, the Court will presume in favour of its existence. *Res v. Stockton.*

353

## ORDER OF SESSIONS.

1. An order of sessions confirming an order of removal is conclusive as against all the world. *Res v. Wick St. Lawrence.*
2. An order of sessions quashing an order of removal, is final between the parties only upon the point which formed the actual ground of decision. *Ibid.*
3. Upon the trial of an appeal against a second order of removal of the same pauper between the same parishes, parol evidence is admissible to shew the particular grounds of the former decision. *Ibid.*
4. And if it appear that the question of settlement was not upon that occasion adjudicated upon, the first order is not final upon that point. *Ibid.*

Ibid.

## ORGANIST.

See SETTLEMENT.

## OVERSEER.

See WARRANT.

## PAYMENT.

### PARCENER.

1. A feoffment by one parcener who occupies alone under a general equity, operates as a conveyance of her own purparty, and as a disbursement of her coparceners. *Doe v. Taylor.* 508

See GRANT, 509, D. (a).

### PARTNER.

1. Where A. in his own name deposits with his banker C. the proceeds of the sale of the partnership effects of A. and B., A. and B. cannot join in an action against C. for the amount, unless it be shown that the deposit was made by A. as agent for the firm. *Sims v. Bond and another.* 608
2. Therefore C. cannot be sued by B. as surviving partner. *Ibid.*
3. So where A. is ship's husband and A. and B. part-owners. *Ibid.*

### PARTNERSHIP BOOKS.

See EVIDENCE.

## PAYMENT OF MONEY INTO COURT.

See PRACTICE.

## PAYMENT.

1. A plea of payment to an action of covenant by A. upon a policy of insurance effected by A. as agent, is supported by an indorsement on the policy by A., purporting that the loss had been adjusted and the balance due from the defendant to A. paid, although the principal has not authorized such a settlement. *Gibson v. Winter and another.* 787
2. Whatever constitutes an answer to the demand for which an action is brought, as against the plaintiff on the record, is a bar to the action, although brought for the benefit of

## PLEADING. 875

others who have no mode of enforcing their claim, except by suing in the name of the plaintiff. 797

## PETITIONING CREDITOR.

See ATTORNEY, 2.

## PIPES.

See POOR RATE.

## PLEADING.

### I. Declaration.

1. *Semble*, that in ejectment the omission of all local description of the demised premises is error, though the county and vill in which the demise was made are stated in the declaration, and the county is stated in the margin. *Doe d. Rogers and others v. Bath.* 440

### II. Plea.

See NON EST FACTUM.

### III. Replication.

2. Where the plaintiff replies one matter to a special plea, the Court will not set aside a verdict found upon an issue joined on such replication, upon an affidavit shewing another answer to the plea which was not replied. *Dodsworth v. Blanchard.* 549
3. To an action against the acceptor of a bill of exchange, the defendants plead an alteration vitiating the bill. The plaintiff replies (by way of new assignment) that the bill sued on was drawn as declared upon, and is a different bill from that mentioned in the plea; the defendant rejoins the same alteration in the bill mentioned in the new assignment, the plaintiff cannot in his surrejoinder take issue upon the identity of the bill mentioned in the rejoinder with that mentioned in the replication and declaration, and conclude to the country. *Heydon v. Thompson, Gent. que &c.* 403  
And see BARON AND FEME, 2.

**POLL.**  
 1. *Mode of taking the Poll at Elections.*

See MANDAMUS, 1.

**POOR RATE.**  
 See DISTRESS.

1. By a royal warrant to the Chelsea Waterworks Company, which recited that the company had prayed the liberty to use and enjoy the canal and old pond in St. James's Park, as reservoirs for supplying the Palace of St. James's and the city of Westminster with water; and also to lay a main or mains through the said park, to and from the same, for the purposes aforesaid; and that the surveyor-general had reported that the undertaking might be convenient to his majesty; the king (Geo. I.) granted to the company the said canal and old pond to be converted into reservoirs, and to be used and enjoyed by the company as such for the purposes aforesaid, during the pleasure of the crown; and also granted to them full licence to dig the ground in the said park for laying and for mending pipes and mains. This grant was subject to conditions, as to the line of direction of the pipes, their dimensions, the mode of laying them down, and the renewal of the herbage, and also for supervision and control of the ranger of the park, and his assistance in the prosecution of the works. The company under this warrant made the reservoirs and laid pipes, and at times made repairs under the supervision of the crown surveyor, without whose permission they were restrained from making any alterations or doing repairs. The fish were taken by the deputy-ranger. The use of the canal, &c. is beneficial to the company, but they paid no rent,

and were paid for supplying the palace with water. The herbage growing on the surface of the soil in the park, including that on which the pipes are laid, was rated in the hands of the ranger. Held, that the Company were liable to be rated to the relief of the poor in respect both of the reservoirs and the pipes, as having the exclusive occupation of a portion of the soil in both cases, though for a limited purpose and only during the pleasure of the Crown. *Rex v. Chelsea Waterworks Company.* 765

## POST-DATING BILLS OF EXCHANGE.

See BILLS AND NOTES, 1.

## POWER.

### I. To appoint by Deed by way of Demise.

1. Under a power to demise certain lands, reserving the ancient rent, a demise made of those lands jointly with others at an entire rent is void. *Doe v. Mathens.* 264
2. Whether the rent has been reserved upon a demise, made under a leasing power, is a question for the jury; and evidence is admissible to shew that the best rent has, in fact, been reserved, although the leasing power also requires that no premium be taken, and the lease, which is stated to be in consideration of the rent and covenants, contains a covenant by the lessee to maintain three adult children of the lessor, the donees of the power, for a small annual sum, and another adult child for nothing. Per *Parke, J.* and *Patteson, J.*; dissentiente *Taunton, J.* *Doe v. Rogers.* 550

### II. To appoint by Will.

3. A power of appointing copyhold by will, may be exercised by a will

## PRACTICE.

not referring to the surrender creating the power. *Doe v. Bird*, 679

III. To appoint, notwithstanding Co-

adit in lotters and returns in equity and

14. A power to appoint by will, not-

withstanding reverses may be exer-

cised by the donee of the power

when discovered. *Ibid.*

15. A power to appoint by will, not-

withstanding reverses may be exer-

cised by the donee of the power

when discovered. *Ibid.*

16. A power to appoint by will, not-

withstanding reverses may be exer-

cised by the donee of the power

when discovered. *Ibid.*

17. A power to appoint by will, not-

withstanding reverses may be exer-

cised by the donee of the power

when discovered. *Ibid.*

18. A power to appoint by will, not-

withstanding reverses may be exer-

cised by the donee of the power

when discovered. *Ibid.*

19. A power to appoint by will, not-

withstanding reverses may be exer-

cised by the donee of the power

when discovered. *Ibid.*

20. A power to appoint by will, not-

withstanding reverses may be exer-

cised by the donee of the power

when discovered. *Ibid.*

21. A power to appoint by will, not-

withstanding reverses may be exer-

cised by the donee of the power

when discovered. *Ibid.*

22. A power to appoint by will, not-

withstanding reverses may be exer-

cised by the donee of the power

when discovered. *Ibid.*

23. A power to appoint by will, not-

withstanding reverses may be exer-

cised by the donee of the power

when discovered. *Ibid.*

24. A power to appoint by will, not-

withstanding reverses may be exer-

cised by the donee of the power

when discovered. *Ibid.*

25. A power to appoint by will, not-

withstanding reverses may be exer-

cised by the donee of the power

when discovered. *Ibid.*

26. A power to appoint by will, not-

withstanding reverses may be exer-

cised by the donee of the power

when discovered. *Ibid.*

27. A power to appoint by will, not-

withstanding reverses may be exer-

cised by the donee of the power

when discovered. *Ibid.*

## PRACTICE.

See EJECTMENT—QUE WARRANTO.

1. Payment of Money into Court.

1. Where upon a count on a promiss-

ory note, payable by instalments,

averring non-payment of such in-

stalments, defendant pleads non

assumpsit, and brings into Court a

sum of money less than the amount

of the instalments, he thereby ad-

mits the special contract, but does

not admit the non-payment of the

instalments, except to the extent of

the money brought in. *Reid and*

*another v. Dickens.* 369

2. And if he also plead the statute

of limitations he will be entitled to

a verdict, unless the plaintiff prove

a sufficient acknowledgment of a

liability to pay something ultra the

sum brought into Court. *Ibid.*

11. Leave to move to enter a Nonsuit.

3. Where leave is reserved to move

to enter a nonsuit upon one point

only, the Court, having the facts

before them, upon the judge's notes,

will take the whole of these facts

into consideration, and will come

to such a decision as the facts re-

quire. *Doe v. Dodd.* 838

III. Certificate for Execution.

4. A certificate for execution during

vacation under 1 Will. 4, c. 7, s. 2,

need not be noticed in the postea

or on the judgment roll. *Engle-*

*heart v. Eyre and another.* 849

IV. Warrant of Attorney.

5. On a warrant of attorney subject

to a defeazance, stating that the

warrant is given, to secure a cer-

tain sum to be paid by instalments,

after the defendant has been taken

in execution for one instalment,

he may be brought up by habeas

corpus and charged further in ex-

ecution with the second instalment,

without a rule to shew cause why

he should not be so charged. *De-*

*vis v. Gompertz.* 1607

## PRESUMPTION. 877

to a defeazance, stating that the  
warrant is given, to secure a cer-  
tain sum to be paid by instalments,  
after the defendant has been taken  
in execution for one instalment,  
he may be brought up by habeas  
corpus and charged further in ex-  
ecution with the second instalment,  
without a rule to shew cause why  
he should not be so charged. *De-  
vis v. Gompertz.* 1607

## PREMIUM.

See POWER, 2.

## PRESUMPTION.

See EVIDENCE.

1. The Court will not presume a fact by which an order of removal would be vitiated. *Re v. The Inhabitants of Stockton.* 853
2. Where an order is silent as to the existence or non-existence of a fact necessary to support the order, the Court will presume in favour of its existence. *Ibid.*
3. Payment of rent by A. to B. is prima facie evidence that A. is tenant from year to year to B., but it is competent to A. to shew that he did not pay it in that character. *Doe v. Dodd.* 838
4. Secus, where the existence of such a tenancy would imply that devisees in trust had conveyed away their estate, whilst a duty still remained to be performed by them, *semble.* *Ibid.*
5. The presumption is completely rebutted by shewing that the rent paid and received is of the same amount as the rent reserved in an unexpired lease, the premises being, at the time of such payment of rent, of much greater value than the rent so reserved and paid. *Ibid.*

## PRESUMPTION OF DEATH.

See 224, n. (b)—EVIDENCE.

**PRESUMPTION OF REGULARITY.***See* **CERTIFICATE.****PRINCIPAL AND SURETY.***See* **BANKRUPT, 1.****PRIVILEGE FROM ARREST.***See* **ARREST, 3, 4.****PRIVILEGED COMMUNICATION.***See* **ATTORNEY, 4—DEFAMATION.****PROHIBITION.***See* **COURT MARTIAL.****PROMISSORY NOTE.***See* **BILLS AND NOTES.****PROSECUTOR.***See* **INDICTMENT.****QUO WARRANTO.**

1. When a relator has twice obtained rules nisi for informations in the nature of a quo warranto, calling upon a party to shew why he exercised the office of mayor of a borough, which rules have been discharged upon cause shewn, the Court will not allow the same relator, on an application against the succeeding mayor, to raise the same questions, as to the title of the former mayor to exercise the office. *Re v. Longdon*, 618

**RATE.***See* **POOR RATE.****REPLEVIN BOND.****REASONABLE AND PROBABLE CAUSE, WANT OF.***See* **ARREST—Costs.****REBUILDING.***See* **BRIDGE.****RECOVERY.***See* **BARON AND FEME.****RE-ENTRY.***See* **COVENANT.****REGISTRATION.***See* 229, n. (a)—**JUDGMENT.****North Riding Registry Act, 229****REGULÆ GENERALES.****Trinity term, 3 Will. 4. 227****RELATOR.***See* **QUO WARRANTO.****RELEASE.***See* **DEBTOR AND CREDITOR.****REMANET FEES, 398 n.****REMOVAL OF PLAINT.**

1. Where a plaint was removed by re fa lo, and the plaintiff in replevin appeared, and the defendant not:—Held, that subsequent delay is not a breach of the bond to prosecute with effect and without delay, even though the sheriff should have neglected to summon the defendant as directed by the re fa lo. *Harrison v. Wardle*, 703

**RENT.***See* **COVENANT—Power—SETTLEMENT.****REPLEVIN BOND.***See* **REMOVAL OF PLAINT.**

1. In an action on a replevin bond.

## RETURN.

(condition) to prosecute with effect and without delay, it is a sufficient breach of the condition that the plaintiff in replevin did not use due diligence in the prosecution of the suit. *Harrison v. Wardle*.

703

2. *Quære*, whether there can be a breach of a condition to prosecute with effect before action determined. *Ibid*.

3. *Semble*, that the assignees of a replevin bond are not estopped from replying a fact, contrary to the sheriff's return to the *re fa lo*. *Ibid*.

*See also* 703, n. (b).

## REPUTED OWNERSHIP.

*See* BANKRUPT, 2, 3.

## REQUEST.

1. *A.* being arrested at the suit of *B.*, upon a writ indorsed "oath for 76*l.*," *C.* writes that in consideration of *B.*'s instantly discharging *A.*, he will give his promissory note to *B.* for 10*s.* in the pound, upon the debt, on the arrival of the discharge. This engagement may be declared upon as a promise to pay 10*s.* in the pound upon a debt for which he was arrested. *Brown v. Dean*.

816

2. Although a request to deliver the note be alleged, no request need be proved. *Ibid*.

*See* ARREST—GUARANTEE.

## RESWEARING.

*See* CRIMINAL INFORMATION.

## RESERVATION OF ANCIENT RENT.

*See* POWER.

## RETURN.

1. What writs may be returnable out of term. *813, 815*

## SETTLEMENT. 879

### RESERVED RENT.

*See* FORFEITURE, 8—PRESUMPTION, 2, 4.

## RESERVOIR.

*See* POOR RATE.

## RETURN.

*See* SHERIFF.

## REVENDEICATION.

1. By the old laws of France, as defined by *Savary* and *Ferriere*.

660, n. (e)

2. By the law of Scotland, as described by *Bell*.

651, n. (a)

3. Abolished in France by Code de commerce, and its name transferred to stoppage in transitu.

650 n. (e)

4. Destroyed in Scotland, by a decision in the House of Lords.

651, n. (a)

## RIGHT OF POSSESSION.

*See* LIEN—TRANSFER.

## RIOTS.

*See* COUNTY, 1.

## RULE OF COURT.

*See* ARBITRAMENT, 8.

## SALE.

*See* FRAUDS, STATUTE OF.

## SECURITY FOR PEACE.

*See* JUSTICES.

## SEQUESTRATION.

*See* JUDGMENT.

## SETTLEMENT.

*And see* EVIDENCE, 7, 8, 9.

1. By Apprenticeship.

1. An indenture by which a person

of twenty-one years of age binds himself an apprentice, does not require the approval or allowance of justices, where premium is paid out of the public parochial funds, under 56 Geo. 3, c. 139, s. 11. *Rex v. The Inhabitants of St. John in Bedwardine*. 86

2. *A.* is apprenticed to *B.*, to be by *B.* instructed in his trade and provided with necessaries. *B.* having no employment for *A.*, advises him to work with *C.* at the same trade, and promises to give *A.* a watch, if *A.* will not trouble him nor the parish till the end of his time. *A.* accordingly applies to *C.*, who employs him at piece-work, out of which *A.* provides himself with necessaries. *A.*, afterwards, with the assent of *B.*, removes from the service of *C.* into that of *D.*, whom he serves in the same trade. At the end of the period for which he was apprenticed, *A.* receives the watch in pursuance of the promise:—Held, by *Denman, C. J.*, *Littledale, J.* and *Patteman, J.*; dissentiente, *Parke, J.* that the service with *C.* and *D.* was referable to the indenture, and that *A.* gained a settlement in the parish in which he inhabited during such service. *Rex v. Inhabitants of Banbury*. 105

#### II. By Estate.

3. If it be the duty of *A.* to take out letters of administration to *B.*, *A.*'s settlement by estate in *Dale*, where the estate of *B.* lies, is not vitiated by showing that administration was taken out at the sole instance of the parish officers of *Sale*, for the purpose of transferring the settlement of *A.* from *Sale* to *Dale*. *Rex v. Inhabitants of Great Glenn*. 91

#### III. By renting a Tenement.

4. Under 6 Geo. 4, c. 57, a settlement may be gained by hiring a

tenement, if the rent be actually paid to the landlord, whether it be paid by the tenant or by another person. *Rex v. Inhabitants of Ruthin*. 97

5. To gain a settlement under 13 & 14 Car. 2, c. 12, by coming to settle in a tenement, it is not necessary that the party occupy as tenant. *Rex v. Inhabitants of St. Mary, Newington*. 97
6. Before 59 Geo. 3, c. 59, a quaker therefore gained settlement by residing forty days in the rectory house, (with the licence of the bishop, under 57 Geo. 3, c. 89,) under an agreement by which such residence was to form part of his remuneration. *Ibid.*

#### IV. By serving an Office.

7. An organist, appointed during the pleasure of the vestry, has not a public annual office, conferring a settlement under 3 Will. 3, c. 11, s. 6. *Rex v. Inhabitants of St. George, Hanover Square*. 505

#### SET-OFF.

1. After the bankruptcy of *A.*, and before his certificate, *B.*, one of his creditors, purchases goods from him. In an action brought by *A.*, after obtaining his certificate for the price of the goods, the add debt cannot be set off, being barred by the certificate. *Hoythar v. Sherwood, Gent.* 401

#### SHERIFF.

##### I. Liability.

1. Trespass lies against a sheriff for an arrest made by his officers, by colour of a warrant under a *ficta*. *Smart v. Hutton*. 426
2. The Court will, upon payment of costs, set aside an attachment issued against the sheriff, upon the rule of Court of Hilary term, 3

will be put in and perfected after the contempt and before the issuing of the attachment. *The King v. Sheriff of Middlesex.* 374

8. Where the plaintiff has not declared, he is not entitled to have the attachment against the sheriff for disobedience of a judge's order, to bring the defendant into Court, stand as a security. *Ibid.*

9. Case lies for a judgment creditor against a sheriff, for not selling within a reasonable time after a seizure under a fi. fa. *Bales v. Wingfield, Esq. Sheriff of Rutlandshire.* 381

5. But the plaintiff in such action can recover nominal damages only, unless actual injury be proved.

*Ibid.*

6. Where, therefore, the sheriff delays selling for an unreasonable time, and before the sale, but after the time when he ought to have sold, receives notice of a fiat in bankruptcy against the execution debtor, and afterwards returns that he has the levy money in his hands, but that he has received such notice, it lies upon the plaintiff to prove the trading, act of bankruptcy, &c., so as to shew that by reason of the sheriff's delay the right of property in the goods seized passed before the sale into other hands, and that the fruits of the plaintiff's execution had been thereby frustrated. *Ibid.*

7. The sheriff or his officer cannot justify the removal of a prisoner to gaol, within twenty-four hours of the arrest, as upon a refusal to be carried to some convenient dwelling-house of his own nomination, without shewing that the prisoner was requested to nominate such dwelling-house. *Stimpson v. Newton.* 52

## SHIP.

See BILL OF LADING—FREIGHT—PARTNER.

1. An advertisement of a ship for sale describes her as copper-fastened, and contains afterwards an enumeration of masts, &c. which is headed "Inventory." The contract for the sale of the ship refers to the "inventory." This reference has not the effect of entitling the vendee to consider the description in the advertisement, as forming part of the contract, though it is shewn to be usual to designate the whole advertisement by the name of Inventory. *Freeman v. Baker.* 446

## SLANDER.

See DEFAMATION.

## SPECIAL OCCUPANT, 497 (b).

## STAMP.

And see BILLS AND NOTES, I, 2.

### I. Admittance.

1. A copy of Court-roll, admitting a surrenderee in trust for the grantee of an annuity there, stated to be secured by the bond of the purchaser, and subject thereto to the use of the purchaser, his executors, administrators and assigns, requires an ad-valorem stamp, with reference to the amount of the purchase-money expressed to be so paid by the purchaser to the surrenderor, but without reference to the amount of the annuity already granted, or to an indemnity to be created in future. *Doe v. Reynolds.* 383

### II. Legacy.

2. A bequeaths real estates to trustees in trust to convey to the use of B. for life, remainder to trustees for B.'s life, to preserve contingent remainders, remainder to the use that C. should take from and out of the premises such annuity or yearly rent-charge, not exceeding 500*l.* per annum, for her



## STET PROCESSUS.

life, as *B.* should appoint, such annuity to be paid to her clear of all taxes and deductions whatsoever. And in default of issue of *B.*, the testator devised the premises charged with the annuity or rent-charge to *D.* *B.* appointed that the annuity should be the full annuity of 500*l.* *B.* dies without issue. *D.* enters, and is compelled by Exchequer process to pay the legacy duty on the annuity:—Held, first, that the annuity was chargeable with legacy duty; secondly, that the legacy duty is a "tax" within the words of the devise; and thirdly, that *D.* takes the land subject to the payment of legacy and legacy duty, and cannot call upon *C.* for repayment of the legacy duty. *Ston v. Davenport.* 803

## STATUTE.

### I. Construction.

1. When a statute authorizes a company to remove and erect buildings, and provides a specific remedy for parties injured by such removal and erection, the occupier of a house adjoining one that has been pulled down, and rebuilt by the company, is not entitled to such remedy in respect of injury sustained by reason of the removal of a party-wall between the two houses, after a notice given under the building act. *Rea v. Hungerford Market Company, in the matter of Mary Yates.* 840
2. Although the company may not have strictly complied with the requisitions of the building act, in respect of such party-wall. *Ibid.*

## STAY OF PROCEEDINGS.

### See EJECTMENT.

## STET PROCESSUS.

1. An arbitrator to whom a cause in

## SURRENDER.

dispute as to the amount of rent due and an action of replevin, the merits of which are involved in that dispute, are referred, has no authority to award a stet process. *Leeming v. Fearley.* 233

## STOPPAGE IN TRANSITU.

1. An equitable right of stoppage in transitu remains in the vendor, notwithstanding an indorsement of the bill of lading by the vendor to a person who advances money on the security of such indorsement, but the right of the vendor is subject to the right of the indorsee to be repaid his advances. *In re Westzynthius.* 646
2. The vendor has an equity to require the indorsee of the bill of lading to repay himself out of other property of the vendee in his hands, as far as such other property will extend. *Ibid.*
3. And if the indorsee apply the proceeds of the property so equitably stopped in transitu in payment of his debt, there being other property of the vendee in the indorsee's hands, the vendor will have a lien upon the interest of the vendee in such other property. *Ibid.*

See BILL OF LADING, 1, 2—LIEN, 1.

## SUBMISSION.

See ARBITRAMENT.

## SUCCESSORS.

## SUMMONS.

See REMOVAL OF PLAINT—DISTRESS.

## SURETY.

See BANKRUPT, 1—COVENANT, 1.

## SURRENDER.

See COPYHOLD.

## TRESPASS.

### TAKATION.

*See* ATTORNEY.

### TENDER.

1. Effect of. *See* VENDOR 373 (c).

*See* DISTRESS.

### TENTALL RENTS, 364.

### TITLE DEEDS.

*See* ATTORNEY.

1. Production of. 419 (a)

### TIME.

#### I. Enlargement of.

*See* ARBITRAMENT—COVENANT.

#### II. Time of Death.

Presumption of, *see* EVIDENCE, II.

### TOWER HAMLETS COURT.

*See* COURT OF REQUESTS.

### TRANSFER.

*See* GOODS, 4—LIEN, 1.

## TRESPASS.

### I. *Quare clausum fregit*.

1. Declaration for trespass in Whiteacre. Plea: that Whiteacre is part of a waste called Dale, over which the defendant had common appurtenant by prescription. Replication: that Whiteacre had been inclosed and severed from the waste and held adversely to the commoners for twenty years. This replication is maintained by evidence that part of Whiteacre had been inclosed twenty years and part not, and that the alleged trespasses were committed on both parts. *Topley v. Wainwright*.

697.

## UMPIRE. 336

### II. To Personal Property.

- And see* DISTRESS—Goods, I.
2. *Semble*, that trespass will lie against a landlord who, having made a sufficient distress, abandons it, and distrains de novo for the same cause. *Smith v. Goodwin*.

114

*And see* 834 (b).

### III. To the Person.

3. Trespass lies against a sheriff for an arrest made by his officer under colour of a fi. fa. *Smart v. Hutton*.

426

### TRIAL.

*See* VENUE, 2.

### TROVER.

*See* GOODS, 2.

### TRUSTEE.

1. Trust in favour of mortgagee, renderer in lord taking by escheat. 791 (c)

## UMPIRE.

*And see* ARBITRAMENT.

1. An umpire may be appointed by lot with the assent of the parties. *In the matter of the arbitration between Tunno and Bird*. 328
2. Such assent sufficiently appears by each party presenting three names, from which that of the umpire is to be drawn. *Ibid*.
3. Or by each party signing the memorandum by which the person whose name is drawn is appointed umpire. *Ibid*.

### UNDERWRITER.

*See* EVIDENCE, 16, 17—INSURANCE.

### UNITY OF POSSESSION.

*See* EASEMENTS, 1.

# VENDOR.

in conveyance relating to the same  
shall be void as to the vendor

## I. What shall amount to a Covenant to stand seised.

1. In articles of agreement under seal, after a recital of an intended marriage between B. and C., A. (the father of B.) "for the support and settlement in the world of B. and C. giveth and settlenth upon B. his lands, from Michaelmas next," for life, remainder to the first son of the marriage, and so on successively for every other son, with remainders over. This is a covenant to stand seised and not an executory contract. *Doe v. Jones v. Williams.* 602

## VALUED POLICY.

to abrow See INSURANCE, 11.

See GOODS, 4—LIEN, 1—SHIP, 1.

## Liability of Vendor of Land.

In an action by A., the vendee, against B., the vendor, upon a covenant to deduce a good title at one of three places, on or before a certain day, a plea by B. that he B. was ready to deduce a good title at that time was insufficient, unless it avers that notice was given to A. at which of the three places B. would be ready to deduce such title. *Rippingall v. Lloyd.*  
Nor can B. plead that by a subsequent agreement, by mutual seal made before breach, the time for deducing such title was enlarged, and that he was ready to deduce such title within the enlarged time. *Ibid.*

Nor, that A., in consideration that B. would deduce a good title and convey, after breach, agreed temporarily to accept such title and conveyance at a later day. *Ibid.*

# WARRANT.

See GOODS, 4—STOPPAGE IN TRANSITU, 1, 2, 3.

## VENUE.

### VI. VENUE.

#### I. Changing.

1. The Court of King's Bench has a discretionary power of ordering a suggestion to be entered on the record of an indictment for felony, removed thither by certiorari, for the purpose of awarding the jury process into a foreign county. *Rex v. Holden and another.* 167
2. But this power will not be exercised except where it is absolutely necessary for the purpose of obtaining an impartial trial. *Ibid.*

## VERDICT.

### See ARREST OF JUDGMENT.

## VESTRY.

### See MANDAMUS.

## WAGES.

### See MASTER AND SERVANT.

## WAIVER.

1. Part of a written contract for the sale of lands cannot be waived by parol. *God v. Davy* 28
2. A purchaser, whose written contract stipulates for a good title, cannot be required to complete the purchase upon a defective title, or the vendor's verbal waiver of the stipulation for a good title. *Ibid.*

### See FORFEITURE.

## WARRANT.

and copy of a warrant in a case

## WATER.

where there is no remedy against the magistrate. *Cotton v. Kodwell*. 399

## WARRANT OF ATTORNEY.

See PRACTICE, IV.

## WARRANT OF DISTRESS.

See JUSTICE.

## WARRANTY.

See SURETY.

## WASTE.

See FORFEITURE.

## WATER.

And see POOR-RATE.

1. The right to appropriate a stream of water in exclusion of any of the other owners of the banks of a stream, cannot be acquired within a less period than twenty years. *Mason v. Hill*. 769

2. No proprietor of the banks of a stream has a right to diminish the quantity or injure the quality of the water, to the detriment of other similar possessors of the other parts of the bank. *Ibid*.

3. A licence to take a quantity of water at a particular place, will not authorize the taking away the same quantity of water at another place. *Ibid*.

4. A general licence to take water at any place is revocable, except as to such places where it has been acted upon and expense incurred. *Ibid*.

5. The owner of the banks of a stream has a right to the advantages of that stream flowing in its natural course, and is entitled to use it for any purpose, not incon-

## WILL.

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sistent with a similar enjoyment in the owners above and below. *Ibid*.

## WAYS.

See EASEMENTS—GRANT.

## HIGHWAY.

## WIFE.

See BARON AND FEME—POWER, 4.

## WILL.

And see DEVISE.

### I. Construction.

1. That construction of a will is to be preferred which, consistently with the rules of law, gives effect to the greater part of it. *Doe v. Gallini*. 619

2. Technical words, or words of known legal import in a will, must have their legal effect, even though the testator use inconsistent words, unless the inconsistent words be such as to prove that the technical words are not used in their proper sense. *Ibid*.

3. The doctrine that a general intent is to be preferred to a particular intent manifested in a will, is incorrect and vague. *Ibid*.

4. A codicil duly executed, whereby the testator confirms his will, does not give validity to an unattested alteration in a devise of lands, made subsequent to the execution of the will; nor to a testamentary paper, purporting to be a devise of lands, unattested, unannexed to the will, and not referred to by such codicil. *Utterton v. Robins and others*. 819

5. A will, in execution of a power of appointing the uses of a surrender of a copyhold estate, need not expressly refer to the surrender on which the power is created. *Doe v. Bird*. 679

**WITNESS.****WITNESS.****I. Privilege from Examination.**

1. An attorney cannot object to give evidence of a statement made by himself to the adverse party by direction of his own client. *Ripon Gent. one &c. v. Davies.* 310

**II. Competency.**

2. In an action against executors, an

**YEARLY HIRING.**

unpaid legatee is a competent witness for the defendant. *Mowell v. Davis.* 745

**YEAR, DAY, AND WASTE.**

*See FELON—and see 501 (c).*

**YEARLY HIRING.**

*See MASTER AND SERVANT.*

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